***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

171

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,532

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HALLIE MILLER,

*Appellant,*

v.

VIRGINIA OREM,

*Appellee.*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE DISTRICT OF COLUMBIA*

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## BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 30 1970

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## TABLE OF CASES



## MISCELLANEOUS

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## BRIEF FOR APPELLANT

### TRAFFIC REGULATIONS

21-A (Section 21-a) which reads:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumstance, and in a speed or manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

Section 22-A reads:

"No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions, and having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the street or highway, in compliance with legal requirements and the duty of all persons to use due care."

Section 22-B:

"Except when a special hazard exists that requires lower speed for compliance with sub-section A of this Section"—and that's the one I just read to you—"the limit specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a street or highway at a speed in excess of such maximum limits as sub-paragraph one reads: 25 miles per hour unless otherwise designated by official signs."

Section 46-A reads:

"The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway."

Section 46-B reads:

"When two vehicles enter an intersection of different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."

Section 99-C, which reads:

"An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

1. Case not previously before Court of Appeals.

2. Trial Court Rulings:
App. 54 (trial)
Record on Appeal 54 (6/9/70)

## JURISDICTIONAL STATEMENT

This appeal is from a final judgment entered in favor of appellee, defendant below, in United States District Court for the District of Columbia Civil Action #1322 - 67, entitled, *Hallie Miller, et al. v. Virginia Orem.* Jurisdiction of this Court is based upon the United States Code, Title 28, Section 1291.

## STATEMENT OF CASE

Identification of parties: Appellant Hallie Miller, plaintiff below.
Appellee, Virginia Orem, defendant below.

Hallie Miller, plaintiff below, brought suit for physical injuries and damages suffered by her in an automobile collision involving two automobiles, alleging negligence and violation of Traffic Regulations on the part of Virginia Orem, defendant below.

The accident occurred on a Sunday evening, May 8, 1966, at about 8:15 P.M., DST, at the intersection of 7th Street and Independence Avenue, S.W., Washington, D.C. A straight, right-angle intersection, 7th Street running north and south; Independence Avenue, east and west. The Police Officer (App. 30) testified that 7th Street was 76' wide; Independence Avenue, 80' wide. Point of impact of the two vehicles was 23' south of the north curbline of Independence Avenue and 60' west of the east curbline of 7th Street. The automobile in which the plaintiff was a passenger and over which she had no control was proceeding south on 7th Street approaching Independence Avenue; the defendant was driving her car west on Independence Avenue approaching 7th Street. No obstructions to vision. Shortly before the accident an electrical storm had knocked out the Traffic Control Signal Lights at the intersection; and street surfaces were wet from the rain. The vehicles came into the intersection and collided, the right front and side of the defendant's vehicle struck and swept on across the front of the plaintiff

vehicle, which had almost stopped, forcing the plaintiff vehicle clockwise 180 degrees, leaving it facing (north) in the direction from which it had come. Defendant's vehicle, after the collision, continued on, through and beyond the intersection an overall distance of 115 feet, in the course of which journey it crossed the median line and southern half of Independence Avenue, jumped the cement curb, crossed the parking and sidewalk and stopped against a tree. Somewhere about 50 feet from point of impact the defendant fell or was thrown out of her car.

The case came on for trial before the court and a jury. Defendant admitted that the plaintiff was free of negligence; the principal issue (exclusive of injuries received and damages) was the negligence and violation of Traffic Regulations of and by the defendant.

At the close of the whole case, plaintiff moved for Judgment or, in the alternative, for a Directed Verdict in her favor, which Motion(s) the Court overruled. The case went to the jury; a verdict in favor of the defendant and against the plaintiff was returned by the jury, and judgment entered thereon.

Post-Trial Motions filed by the plaintiff were: (1) Motion for Judgment, n.o.v., under Rule 50; and (2) Motion to Vacate the Verdict of the jury and for a New Trial, both of which Motions were overruled. This appeal followed.

## STATEMENT OF POINTS

1. The verdict and judgment are contrary to law and not supported by the evidence in the case. It is a miscarriage of justice and should be vacated and set aside, and the cause remanded for entry of judgment in favor of the appellant, or (in the alternatice) for a retrial of all issues in the case.

2. The Trial Court erred in overruling plaintiff's Motion for judgment and for a directed verdict made at the conclusion of the whole case.

3. The Trial Court erred in overruling plaintiff's Motion for Judgment, n.o.v., under Rule #50.

4. The Trial Court erred and abused it's judicial discretion in overruling plaintiff's Motion for a New Trial.

5. The evidence in the case establishes negligence on the part of the defendant as a matter of law, entitling plaintiff to a verdict for permanent physical injuries received and damages sustained in the accident in question, the plaintiff having been a passenger in one of the vehicles involved and without negligence.

6. There is no competent evidence to support the verdict and judgment of the court below, and the same should be vacated.

(Note: Issue of injuries and damages not involved here)

## SUMMARY OF THE ARGUMENT

1. The defendant, under the evidence in the case and admitted to by her, was negligent as a matter of fact, and as a matter of law.

2. Plaintiff was entitled to a verdict for damages, she having been a passenger in the other car and, admittedly, free of contributory negligence.

3. The verdict and judgment are not supported by the evidence, and should be vacated and judgment entered for plaintiff upon the issue of liability; and the cause remanded to the lower court for further proceedings upon the issue of injuries and damages only. Or, in the laternative,

4. The Trial Court should have set aside the verdict and entered judgment for plaintiff, or granted a new trial.

5. This Court should reverse and remand the case to the lower court for further proceedings as this Court may direct, or for such further or other relief as the nature of the case may require and to this Court may seem just and proper.

## ARGUMENT

The thrust of appellant's argument is as follows:

1. Appellant contends that the defendant below was negligent as a matter of law; and as a matter of fact; (1) by the evidence in the case and (2) by her own admission. Admittedly, there is no evidence of negligence on the part of the plaintiff barring her from a recovery.

2. The defendant below, in her Deposition on discovery and in her testimony at the trial admitted (App. 35) to bad driving conditions due to the weather and effects of a violent storm; that in the block leading up to the intersection her rate of speed was 20 to 25 miles an hour (25 Mile Maximum Speed Limit); when and while she was a substantial distance east of the intersection she had an unobstructed view across open land to her right (where plaintiff vehicle was approaching) a distance which she estimated to be one-third (1/3) of a block; that when she was at this point an appreciable distance from the intersection she looked to her right, across the open area, and saw no approaching vehicle southbound on 7th Street. Seeing nothing, she continued up to the intersection; with her foot still on the gas pedal, accelerating, she entered the intersection; her car continued 60 feet into the intersection at undiminished speed and with no application of brakes or slowing down. She never looked to her right a second time; admitting then that she did not look when her car was crossing the near pedistrian cross-walk line, or when it was entering the intersection, or while her car was proceeding 60 feet within the intersection itself to the point of impact. Somewhere in this overall distance, between 100 to 200 feet, the defendant should have looked to her right for approaching cars; if she had looked a second time, had looked to her right when the front of her car was entering the intersection or while her car was traversing a very wide intersection, she could and would have seen the plaintiff vehicle, for it was there to be seen. While the defendant was exercising no

care for the safety of herself or others, the plaintiff vehicle was approaching the same intersection; it was slowing down (the Police Officer testified to 19 feet of brake marks made by the plaintiff vehicle (App. 31); it entered the intersection and proceeded into it some 23 feet—a probable overall distance of 100 to 200 feet, yet the defendant never saw it at any time prior to collision, by her own admission (E.00).

Considering the very bad "foggish" night; the rainy, wet streets; the knocked out traffic control lights; the defendant's rate of speed—practically the maximum speed allowed under ideal conditions—as she approached, entered, and proceeded 60' into a very wide intersection; that she had a goodly distance and ample time to look—once, twice and three times, if she had wanted to—to see the plaintiff vehicle approaching; yet she at no time saw the plaintiff vehicle until her car was in collision; notwithstanding that she had a clear, unobstructed view across the open corner and up (north) on 7th Street. Further, admittedly failing to slow down upon approach to the intersection; failing to apply brakes at anytime prior to collision; accelerating and maintaining a dangerous rate of speed, under the circumstances, into and 60 feet across the intersection, which speed carried her car an additional 115 feet beyond the point of impact, over a cement curb, across a parking and sidewalk, and finally to stop only after breaking down a tree, in the process of which the plaintiff vehicle, a heavy Imperial 4-door sedan automobile was struck and turned around a full 180 degrees until it faced in the opposite direction from which it had come. As to all of which undisputed evidence the appellant here submits that the defendant was negligent as a matter of fact and as a matter of law, for which the appellant was and is entitled to be reimbursed in damages. It may be contended that the driver of the plaintiff vehicle was negligent. Such argument is not pertinent here. The question here is whether the defendant, on the occasion in question, was negligent to any degree in causing,

or concurring with the negligence of another to cause the accident in which the plaintiff was injured. It is respectfully submitted by the appellant that the defendant was negligent and that her negligence solely caused or with negligence on the part of the driver of the plaintiff vehicle, concurred in causing, the accident and collision which injured the plaintiff. Considering the evidence and the admissions of the defendant constituting negligence, the Traffic Regulations, the decisions of this Court and the D. C. Court of Appeals, the appellant is entitled to recover for her injuries from the defendant-appellee.

## CASES AND THE LAW

The law is well settled in this jurisdiction, as follows:

The defendant by her own admissions in testimony was negligent and her negligence was a proximate–actually, the sole–cause of the accident and resulting permanent injuries to the plaintiff, a passenger in the vehicle which the defendant failed to see prior to collision, although it was there to be seen. If all other evidence establishing her negligence is put aside for a moment, her failure to look, to look effectually, and to see what was there to be seen is negligence as a matter of law. She admitted that while quite some distance from the intersection which she was approaching, she had a clear view of the approach of plaintiff vehicle which was approaching from her right. As the defendant put it, "about One-Third of a block north on 7th Street," yet she never saw it before impact. Under the appellate decisions in this District and in other jurisdictions, the law upon this point of not seeing approaching vehicle(s) is well settled:

A look at the general law, we turn to BLASHFIELD AUTOMOBILE LAW AND PRACTICE (latest edition). Blashfield is an outstanding authority on automobile law. It's pronouncements in all areas of

automobile accident law find support in appellate decisions all over the United States.

Section 104.4: "Extent of Observation:

> "In the fulfillment of his duty to keep a careful lookout, a motorist is required to look in such an intelligent and careful manner as will enable him to see the things which a person in the exercise of ordinary care and caution for his own safety and the safety of others would have seen under similar circumstances.
>
> "The failure of a motorist to see what would have been plainly in sight if a proper lookout had been maintained ordinarily cannot be excused."

In this connection, Blashfield discusses the "Physical Fact" Rule:

Section 104.4 Pocket Parts:

> "The Physical Fact rule is that if a driver does not see that which he could or should have seen, he is guilty of negligence *as a matter of law.*"
> (citing: Pa. Nat. Mutual Cas. Ins. Co. v. Dennis; (408) P(2) 575.)

Appellate decisions in the District of Columbia, and cases across the country, are legion in holding that a motorist who does not look for other traffic is negligent as a matter of law. Ineffectual looking and not seeing another vehicle that is there to be seen, likewise, is negligence as a matter of law:

25 years ago, the law on this point was set in the District of Columbia in *Brown v. Clancy*, 43 A.2d 296, 298. A landmark case, still being cited and relied upon. The Court held,

> "When a litigant has a duty to look and testifies that he did look but did not see what was plainly to be seen, such ineffectual looking has no more legal significance that if he had not looked at all. He may not merely look—he must look observantly and with effect. And if he fails to see what the evidence conclusively shows

> is there to be seen, the law imposes a penalty for his lack of care—it declares him contributorily negligent and bars recovery for his injuries.
> "We think that to reasonable minds the conclusion is inescapable that the truck was so close that it was well within plaintiff's range of vision when he looked and failed to observe it."

The testimony of the defendant Orem, with all favorable inferences allowed, brings her squarely within the rule laid down in *Brown v. Clancy*. With the plaintiff, Hallie Miller, a passenger in the plaintiff car and free of negligence, it necessarily follows that the verdict of the jury and the judgment thereon is not supported by the evidence and, clearly, is/are contrary to law.

7 years later, in *Brown, et al., v. Saunders,* 89 A.2d 632; the Court, following *Brown v. Clancy*, held,

> "The effect of plaintiff's testimony was that he did not see any cars coming in either direction; that he proceeded into the intersection and when he was approximately half way through he glanced both to his left and to his right without seeing any automobiles. He then proceeded another 9 feet and was struck by the defendant's car in the right rear of his own vehicle." Verdict for plaintiff *"Reversed."*

In another 5 years, the Court of Appeals of the District spoke out again and to the same point, in *Mitchell v. Allied Cab Company,* 133 A.2d 477, as follows:

> "In other words, a driver must not merely look but is charged with the responsibility of seeing what is there to be seen, and if he fails in this regard, then the law imposes a penalty for his lack of observation, declares him contributorily negligent and prohibits recovery. A review of the transcript discloses no doubt that the taxicab was so close that if they had looked observantly they would have seen it, and we

> therefore hold in this case that the court was justified in finding contributory negligence *as a matter of law.*"

Next year, 1958, in the case of *Pryor v. Scott, et al.*, 146 A.2d 569, the Court said,

> "This appeal attacks the finding of contributory negligence. Appellant asserts that because his automobile was first in the intersection (claimed in the present case) he had the right of way. He relied on Bland v. Hershey, 60 App. D. C. 226; 50 F(2) 991, but that case holds that right of way is relative and not absolute. Appellant's testimony was that when he reached the intersection he saw appellee's car approaching on his right, 20, 30 or 40 feet away, but nevertheless he proceeded into the intersection without slowing (admitted in the present case) down, we cannot say this testimony would not support a finding of contributory negligence."

6 years later, 1964, in *Phillips v. D.C. Transit Co.*, 198 A.2d 741, the appellate court, following the prior decisions, held,

> "Even if we assume there was primary negligence on the part of the bus driver, there can be no doubt from all the testimony that had the appellant looked effectually to the right before leaving the stop sign and entering the intersection, she would have seen the bus coming toward her at a distance that was an immediate hazard and should have yielded the right of way in compliance with the Traffic Regulations. *Her failure to do so was negligence as a matter of law.*"

In 1966, in *Sims v. East Washington Railway Company*, 222 A.2d 641, the Court, again, stated,

> "Furthermore, the law is well settled that if a litigant looks but fails to see that which the evidence conclusively shows is there to be seen, he is contributorily *negligent as a matter of law.*"

(citing Glaria v. Washington Southern R. Company, 30 App. D.C. 559, and other decisions.)

In 1967, in *Singer v. Doyle*, 236 A.2d 436, the court held,

> "Throughout her testimony, appellee insisted that she never saw appellant's automobile prior to the impact. In our judgment the only conclusion that may be drawn from appellee's own testimony is that before undertaking to make a left turn she failed either to look at all, or to look observantly, and see what should have been plainly visible. Had she been alert and attentive, she would have seen appellant's car in such proximity and coming at such a speed as to be an immediate hazard. The law imposes a penalty for this lack of care—it declares appellee contributorily negligent and bars her right to recover, despite appellant's concurrent negligence. (citing decisions)
>
> "We hold that the trial judge should have granted appellant's Motion for a directed verdict at the conclusion of the evidence or, later, his motion for judgment, n.o.v., the point having been saved subject to a later determination of the legal question raised by the motion. Reversed with instructions to set aside the verdict and judgment for the appellant."

In 1969, in *H. R. H. Construction Corp. v. Conroy*, 134 U.S. Court of Appeals, D. C., 7; this Court (speaking to the point of the effect of violating Regulations) said,

> "Where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent type of accident that occurred, unexplained violation of that standard renders defendant *negligent as a matter of law.*"

Other undisputed evidence in this case is that brake marks 19' in length were made by the plaintiff vehicle. Considering reaction time, time to press the brake pedal, and brakes to take effect, it is

clear that the plaintiff vehicle was slowing down, if not stopped, when the collision occurred–except for which, the plaintiff vehicle would have been entirely across the intersection and out of danger from defendant's vehicle. Had defendant applied her brakes before entering or while going across the intersection, instead of "accelerating through the intersection" as she testified, the plaintiff here would not have been injured. Likewise, defendant vehicle, except for her speed, would have passed to the rear of plaintiff vehicle. Is plaintiff to be punished because plaintiff driver saw and reacted to the likelihood of accident and the defendant did not?

By way of summary, the testimony of the defendant Orem, construed most favorably to her, clearly shows that the defendant's (1) view of the area at all times was unobstructed; (2) at a point approximately 75' before the intersection she looked to her right and could see One-Third (1/3) of a block north on 7th Street (on which plaintiff vehicle was approaching), yet she did not see the plaintiff vehicle thus approaching; (3) the plaintiff vehicle was there to be seen; (4) the defendant Orem never looked a second time to her right for approaching cars, while her car traveled an overall distance of between 100 and 200 feet; (4) her failure to look observantly and with effect and to see what the evidence conclusively shows was there was negligence in law and in fact; (5) that the verdict and judgment clearly were and are contrary to law and should not be allowed to stand, for it is manifestly clear that the jury blatantly disregarded the applicable law and failed to apply the law contained in the Court's Charge to the evidence in the case, including the testimony of the defendant, herself, as to what she did and did not do in the operation, guidance and control of her car on the occasion; and (6) finally, upon all of the evidence in the case construed most favorably to the defendant, there remains no competent or substantial evidence to support the verdict and judgment, and, therefore, judgment should not be entered for the plaintiff, an occupant of one of two cars involved in a collision.

## IN CONCLUSION

It is respectfully submitted that the Court here should vacate and set aside the judgment entered in the lower court and forthwith enter judgment for the plaintiff-appellant upon the issue of liability, returning the cause to the lower court for further proceedings (inquisition of damages); or, in the alternative, it is submitted that the judgment should be reversed and a new trial awarded (as to all issues). And for such other and further relief as the nature of the case may require and to this Court may seem meet and proper.

Paul J. Sedgwick,

*Attorney for Appellant.*

# INDEX TO APPENDIX

## APPENDIX

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

HALLIE MILLER and
BOYD C. MILLER,

*Plaintiffs,*

v.

Civil Action 1322-67

VIRGINIA OREM,

*Defendant.*

**[Excerpts From Transcript of Proceedings]**

* * *

[3] DIRECT EXAMINATION

BY MR. SEDGWICK:

Q. Will you tell us your full name, please? A. Hallie Roselle Talbot Miller.

* * *

Q. Where do you live, Mrs. Miller? A. Salisbury, North Carolina.

[4] Q. Keep your voice up. How long have you resided there? A. Since 1944, May of 1944.

Q. Are you employed? A. I am employed in our company, Miller Equipment Company.

Q. And the Miller Equipment Company engages in what sort of business? A. We fabricate steel for bridges and for highways, and we also build equipment and engineer and design parts for the ceramic industry, which includes brick plants and tile plants and pipe plants.

Q. I am interested to know what your particular position or job is in that company? A. I am vice president, which is an officer of the company, but I take active part, and have ever since the company was organized, in the capacity of the business part of it, like accounting, bookkeeping and all types of records and job costs, pay-

roll records and all the office work. I do see about all the office work.

Q. So you have now told us, dating it back to 1966 specifically what your duties have been there? A. Right.

Q. Now I will come back to the matters of your employment compensation a little bit later but as a part of the company [5] work did you and Mr. Miller and others have occasion to come to Washington back in the month of May, 1966? A. We came up here to attend the American Ceramic Convention that is a convention for people in the ceramic industry which includes glasswares and china wares and we go every year, and it was being held in Washington at this particular time.

Q. Where in Washington was that meeting being held? A. The Ceramic Convention has a large membership and required several hotels to accommodate all the members of this convention.

Q. Where was the meeting to take place? A. The meeting part was at the Sheraton, but the people were in the Sheraton and the Shoreham.

Q. Those were the two hotels out near the Taft Bridge across Rock Creek Park—Connecticut Avenue; is that right? A. Right.

* * *

[6] Q. Who else was in your car when you left to go to the Flagship Restaurant? A. Beside myself?

Q. Besides you and Mr. Miller. A. And Mr. Cooper who was driving, my son William, Edward, his wife. Nancy Jackson Miller, and Mr. Cooper's wife, June Cooper.

Q. What was the seating arrangement—who sat where? A. Mr. Cooper was driving. I was in the center of the front seat next to Mr. Cooper. Mr. Miller was on my right.

* * *

***what was the condition of weather? A. The condition was that there had been a very terrible [7] electrical storm, thunderstorm

with lots of lightening and lots of thunder and rain, and as we were driving along real slowly, it seemed to begin to slaken up and we kept driving slowly on our way to the Flagship. Then as we came into this—as we were driving along, the street lights were out. There were no traffic lights. The streets were real wet, but we went along slowly. Then I was looking straight ahead—

* * *

Q. As you were going along that particular block, before the place of accident, what other cars, if any, were going along the same way you were going? A. Well, we were behind—there was a car in front of us and we were just following slowly behind cars.

Q. When you got right about to where the front of your car would be entering the intersection, were you looking in any particular direction? A. I was looking straight forward and kind of to this [8] side, but—I had been talking to Mr. Miller.

* * *

A. I heard Mr. Miller say something like, you know, something about hitting—something going to hit us, "He is going to hit us," something like that. And then everything then was—and the loud noise and everything and I felt like that I had been in an explosion. I mean I was like on fire and I was resting back in the seat like this against Mr. Cooper. I thought I was—

* * *

A. Well, I was thrown into the steering wheel and Mr. Miller, too, with me, into the steering wheel, like this. And that's when I was like I was hurt, I was in terrific pain. And I found myself lying down like this on Mr. Cooper, and Mr. Miller said—

* * *

Q. Were you knocked unconscious or not? [9] A. I was not unconscious. I thought though—I had my eyes closed because as I opened my eyes it was complete blackness. Total dark, black. I couldn't even see one thing.

Q. When the darkness kind of disappeared from your eyes and you became aware of where you were, in which direction was your car pointing? A. I didn't come to enough to know that. I came to enough to say that I was dying.

* * *

Q. Did you see Miss Oren's car before you left the area? A. I did not see Miss Orem's car.

Q. Then I take it you didn't see her either? [10] A. I didn't see her either.

Q. When the ambulance came, you were placed in the ambulance, were you? A. I was placed in the ambulance.

Q. Who went to the hospital in your ambulance? A. Mr. Miller and Mr. Cooper.

Q. Did you see what ambulance she went to the hospital in? A. I didn't ever see Miss Orem.

* * *

[17] Q. Now then, I want to interrupt at that point and jump to another matter.

Approximately two years later in the year 1968 I believe you went through another automobile accident of some kind; is that right? A. I was in an accident.

Q. Where did that take place? A. On the Pacific Coast Highway, in Malibu, California.

* * *

[18] Q. Coming then to the year 1967 which would be the accident on May 8, '66, through that year and we are starting through the next calendar year: Under which doctor, if any, were you receiving treatment? A. In 1967 I decided I would go to see Dr. Yount.

Q. Doctor who? A. Y-o-u-n-t, at the Baptist Hospital in Winston-Salem.

Q. "Baptist" did you say? A. Baptist, in Winston-Salem.

Q. What was your visit for there? A. I went for a thorough examination of my chest because I was having so much pain in my chest from my ribs being injured. They had never stopped hurting.

Q. You spoke of Dr. Young treating you there, how long there that year did he continue to treat you? A. Dr. Yount didn't keep me in the hospital, but gave me a report that the pain in my chest and all was something from my accident and that too, you know— there was no operation or nothing he could do on them.

* * *

[31] CROSS-EXAMINATION

BY MR. WYLAND:

Q. Mrs. Miller, in the bills which you identified a moment ago, there is a bill from the North Carolina Baptist Hospital, is that the one in Winston-Salem? A. Yes.

Q. And is that where you went in 1967? A. Yes.

Q. As I recall you said that you were having some chest pain? A. Yes.

Q. Is it the same kind of chest pain that you're still complaining of? A. Yes.

Q. So your admission to that hospital then was related to this accident? [32] A. Yes.

Q. Were you off work while you were in the hospital in Winston-Salem? A. Yes.

Q. Is part of the income loss you were claiming a part of that time also? A. I would have to go back and get that record and see. I am vice president of the company. I can pay myself when I am out of the company or if I am in it. But I try to do the fair thing about it. If I prepare my work before I leave and get my secretary, leave her something to do—

Q. I am sure that's true, but what I wanted to know if part of the time— A. At that time—

Q. Excuse me. Whether part of the time you are claiming you were aware in this accident— A. Yes.

Q. —is that period of time you were in this hospital in Winston-Salem? A. I don't know what part that you're saying I am claiming.

Q. I understand your claim to be that whether you actually lost it or not you were entitled to have and therefore you are claiming a loss of income as a result of the time you were away from your office as a result of this accident? [33] A. Yes, unless, though—if I get back and do all my work, I go ahead and pay myself that salary, by the hour.

Q. My question is whether you are including in this time that you were away, because of this accident, the time that you were in the hospital in Winston-Salem? A. I would have to go back to my records and look at that, my earnings card. I keep a complete earnings card on that.

Q. Did you bring those records with you? A. I did not bring the earnings card.

Q. Do you recall when I was down in Salisbury—wasn't it in January—taking your deposition? A. Yes, I do.

Q. Do you recall at that time I asked you at that time if you had any records? A. Yes, I do.

Q. Have you made any attempt to look for them since then? A. What was your question?

Q. Have you made any attempts to look for those earnings records? A. I don't have to look for them. I know where all the records are.

Q. But you did not bring any of those records? A. I didn't bring them.

[34] Q. Those records would show you the times you were actually away from the office, wouldn't they? A. Those records would show when I got paid but I do not clock in on a time clock. If I am out I figure my time and I don't clock in and out like the regular payroll, and my checks will show you, I did tell you that I worked five days a week, eight hours a day.

Q. I am asking you about the record though, they would show us the hours that you were away from work, wouldn't they? A. Yes, they would. Well, you say the hours I am away. They would show, my checks would show that I didn't collect when I was out that week or those two weeks itself. I get paid every two weeks but I don't have any time card records on it.

* * *

[39] Q. I understood you to say that that's all the injuries now that you sustained in that accident were confined to an area below your waist? A. Yes.

Q. That claim is in suit in California, isn't it? You have a suit pending out there? A. It's completed. It's finished. It's over. I mean, you know—so it's not pending now, no.

* * *

[43] Q. As. Mr. Cooper was approaching the intersection on that night what were you doing in the car? A. I was sitting and looking ahead and had just said something to Mr. Miller. I had been talking to him.

* * *

[44] Q. He was sitting on your right hand side? A. He was on my right.

Q. But at the time the accident occurred you were not actually talking? A. I wasn't talking, no.

Q. Was he responding to you or to what you said? A. We had finished talking and I heard him exclaim something, and then I felt like I was in an explosion.

* * *

[49] Thereupon

BOYD COLUMBUS MILLER

was called for examination and, after having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEDGWICK:

Q. Mr. Miller, keep your voice up so all in the courtroom may hear you tell us your full name. A. Boyd Columbus Miller.

* * *

Q. You live where? A. 1123 Henderson Street, Salisbury, North Carolina.

Q. What's your connection with the Miller Equipment Company? A. I am president and major stockholder.

* * *

[50] Q. On May 6, you and members of your family were in the District of Columbia weren't you? A. That's correct.

Q. What was the object of your being up here? A. We were attending a meeting of the American Ceramic Society being held in Washington at the Shoreham and the Sheraton Hotel.

Q. We have learned that May 6 was a Sunday. Somewhere along in the evening did you and the others go in your car to the Flagship Restaurant? A. No, we did not go to the Flagship Restaurant. We started to the Flagship Restaurant.

Q. You had an accident, we all agree, at 7th and Independence Avenue, Northwest. A. That's right.

Q. How familiar were you with Washington and that area before this accident? A. I had been in Washington a number of times but I still, even to this day, am not real familiar with the way the [51] streets run and the circles they have on the different drives. I still can't get around in Washington without a map.

Q. And we are only concerned with this one intersection. Will you tell me the street on which you were proceeding, the direction you were going and the number of lanes that were southbound on your street? A. We were proceeding south on 7th and there are three lanes of traffic to proceed south, three lanes of traffic to proceed north on 7th.

Q. Was Cooper driving your car? A. Mr. Samuel Cooper was, yes—was the driver.

Q. He had a fatal accident at some later time; is that correct? A. That's correct.

Q. It was a plane crash of some sort? A. It was a plane crash.

Q. Just the date of it, can you tell us how long after this accident? A. I am guessing—about two years but I can't give you the date. It's a matter of record. I could look it up.

Q. I would like you to tell the jury in which lane your car was proceeding driven by Mr. Cooper, its approximate rate of speed, what you observed about the intersection and how the accident happened. Turn to the jury and tell them in your own words the best you can recall. [52] A. First, in the early evening hours of May 8, 1966, Washington experienced a tremendous electrical rain storm. It knocked out in parts of the city all of the electric current. It knocked out all the traffic signals. All the street lights, all the lights in the buildings of the area. At the time of this accident I don't believe it was raining but had been raining very hard. The streets and everything were still wet. There were absolutely no lights anywhere other than automobile lights. Mr. Cooper was driving a 1966 model Chrysler Imperial that was only two weeks old. We were proceeding south on 7th Street and we were in the lane next to the center median dividing the traffic between the northbound traffic and the southbound traffic when we entered the intersection. At the time we entered the intersection I noticed three cars coming from my left which would be coming from the east and proceeding west. The lead car was the car that knocked us all the way around turning our car back in the opposite direction from the way we were going and that was the Virginia Orem car.

The Virginia Orem car continued on down the street, I am going to guess between 100 and 150 feet, and was stopped against a tree on the south side of Independence. Our car was not in the

same lane but was turned in the opposite direction in another lane headed back north instead of south. Virginia Orem was approximately halfway between the intersection and her car and was sitting up in the street at the median after the [53] car stopped. I didn't get out of the car until after my son and Mr. Cooper had—well, my son and Mr. Cooper's wife had gone somewhere to call an ambulance, so they called police and an ambulance and after the ambulance got to the scene of the accident, I got out of the car. Mr. Cooper was still in the car. My wife was leaning over. Well, he was supporting my wife to keep her from moving and puncturing a lung with all these broken ribs. But I got out of the way so the ambulance attendants could help get her attached to—I don't know what you call it. Some sort of a board arrangement. Something they slide under her and attached her body to this gadget and in that they carried her to the ambulance.

I got in the ambulance. Mrs. Orem was in the same ambulance and so was Mr. Cooper. All four of us went to what was then the Casualty Hospital and it's now the Rogers, I believe.

* * *

Q. Let me ask you this: Coming back to before the accident—you spoke of having seen three westbound cars, which car was the lead car coming west? A. The Virginia Orem car, the car that struck us was the lead car of the three cars going west.

Q. What, if any, traffic was there—meaning automobiles—going in your direction? [54] A. There were two or three cars in front of me that proceeded through the intersection first. We were approximately between one and two car lengths approximately behind the car immediately in front of us.

Q. When you first looked and saw those three westbound cars with the Orem car in the lead, did you have it under your observation long enough to make a reasonable approximation of its rate of speed? A. I think so.

Q. What in your judgment was her rate of speed? A. Between 40 and 50 miles an hour.

Q. Was there any change in her rate of speed from the time you first observed her car until the collision? A. I don't think so. I don't think she applied her brakes at all.

Q. What lane of her street was she on as far as you know? A. She was next to the center median, same as we were.

Q. How did the two cars come together? A. Let's see: Our left front and her right front corners collided. And in so doing, her car going so much faster than ours went right on across the front of our car, turned our car all the way around and then her car proceeded on down the street between 100 and 200 feet.

Q. You have told us how far she went afterwards. As [55] you were coming along with Cooper driving your car, and got within a distance of the length of this courtroom from the corner, what was your rate of speed? A. Around 12 miles an hour.

Q. Why were you going so slow? A. Because of the existing conditions.

It was the blackest night I have ever seen. There was no signal street light, a traffic light or anything. Only lights you could see was automobile lights reflecting off of wet black pavement. That is all.

Q. Did you see any headlights in front of her car indicating whether or not she had her headlights on? A. Yes, she had her headlights on.

Q. Where on Independence Avenue was her car when you first saw it and the other two that were following her? A. Several car lengths from the intersection.

THE COURT: You mean before entering the intersection?

THE WITNESS: Yes, before entering the intersection. I saw her car before she entered the intersection and I so informed Mr. Cooper. I says, "That car is going to hit us."

BY MR. SEDGWICK:

Q. Now what I'd like to know is, which of these two cars arrived at its respective intersection lines—do you know what I mean by the intersection lines? A. I think so.

[56] Q. Which car arrived at the intersection first, as you recall it? A. Our car did. Our car arrived at the point of entering—well, if you draw a line from the north side of Independence, draw it across 7th, then that's the edge of the street. I'd say the intersection starts when you cross that line. Well, our car was across that line prior to the time that the Virginia Orem car crossed a similar line that would be across Independence.

Q. How are you able to explain that she was a little farther through the intersection than you were? A. Her car was driving about four times as fast as ours was. So in the same length of time her car would travel four times as far as our car would travel.

Q. Did you go over, after you ultimately got out of your car, did you go over to Miss Orem and have any conversation with her? A. No, I did not.

Q. Did you talk to her at any time in the hospital or anywhere else? A. I spoke to her at the hospital. We didn't have any drawn out conversation. I believe I asked her one question, if she was badly hurt, I believe was the question I asked her.

* * *

[58] Q. When you got back to North Carolina, what was the first medical treatment you received? A. I went to see Dr. Feezor on a number of occasions.

Q. What did he do for you? A. Well, he eventually referred me to—well, first he referred me to the physical therapy department and then I was under Mr. Bruce South who is a registered physical therapist, and then I kept on having so much trouble that he eventually [59] sent me to a Dr. Ira Wentz and I remember on one occasion that I was in such terrific pain with my right arm and shoulder

that I went to the emergency room of the hospital and just sat there and cried like a baby while they were trying to get a doctor to come and do something for me.

Q. Let's establish this by dates about how long you had gotten back to Salisbury. A. Several months. Several months.

Q. Did you go for examination or treatment to the Rowan Memorial Hospital? A. Yes, I did.

Q. When did you first go there in relation to your arrival time back in North Carolina? A. I went to Dr. Feezor's office first.

Q. Whose office? A. Dr. Feezor's office.

Q. He is your family doctor? A. Family doctor, right.

Q. Then when did you go to this Rowan Memorial Hospital? A. I believe it was about a week after the accident, something like that.

Q. What was done for you at the hospital there? A. They gave me heat pads and—what's this?—ultrasonics, that's the word. Ultrasonics sound treatment.

[60] Q. Ultrasonic? A. Ultrasonic sound treatment, and exercises for my arm and shoulder and neck.

Q. How long did they continue? A. They put me in one of these things they hang your neck from and pull on your neck and stretch it way up and then it comes back down and stretches again and they keep doing that. I don't know what you call it.

Q. How many of those treatments did you have following your return by one week? A. Number of them. Dozens of them.

Q. Covering what length of time? A. A year and a half.

Q. Did you receive any treatment at a Bowman-Gray Clinic? A. Yes, I did.

Q. Where was that clinic? A. Winston-Salem, North Carolina.

Q. When did you go there, why did you go there, and what was the treatment they did for you there? A. Actually I didn't really go there for treatment. I went there for diagnostic examina-

tion which I do rather regularly every couple of years or so, just as a physical check-up. So I didn't really go to the Bowman-Gray Hospital for treatment because of this accident or for any other reason.

[61] Q. All right, we'll strike that one out.

Did you go to a Dr. Thurston or a Dr. Ware for any reason? A. Yes, I did.

Q. When did you first go to those gentlemen and what for? A. I can't give you the dates but they made pictures of my shoulder and neck and arm.

Q. You made x-rays? A. X-rays, yes.

Q. You spoke already of going from Dr. Feezor to a Dr. Wentz? A. Yes.

Q. When did you first go to Dr. Wentz? A. Well, when I was having such terrible pain that I just couldn't even stand it. And went to the emergency room of the hospital, that's when Dr. Feezor called in Dr. Wentz.

Q. Is Dr. Wentz any kind of specialist? A. Yes, bone specialist.

Q. How long were you under his care and treatment? A. About a year.

Q. How frequently would you see him during that period of a year for treatment? A. Well, he sent me back to the Rowan Memorial Hospital physical therapy department. This one time at the hospital [62] they injected my shoulder and all with needles and gave me hypodermics for pain and manipulated my shoulder and arm and neck, and of course I was in such bad shape after all that, I couldn't, for a few weeks, go take any more physical therapy but after that Dr. Wentz sent me back to Rowan Memorial Hospital for more physical therapy.

* * *

[65] Q. How badly damaged was your two weeks' old automobile? A. Enough that I made 'em get me a new one.

Q. As a total loss? A. Yes.

MR. WYLAND: I believe there has to be some better evidence besides this witness's testimony.

THE COURT: Are you going to have any other witness on the damage to the automobile?

MR. SEDGWICK: I have what corroborates the gentleman's testimony right here.

THE COURT: Will it be marked? Have you seen this, Mr. Wyland?

MR. SYLAND: I have not.

THE COURT: Mark it the next exhibit.

THE CLERK: Plaintiff's Exhibit Number 3 in evidence.

(Mr. Wyland looking at document)

MR. WYLAND: May we come to the Bench, Your Honor?

(At The Bench:)

MR. WYLAND: If the Court please, this exhibit that has been marked as Plaintiff's Number 3 is a sworn statement, Proof of Loss apparently given to Mr. Miller's insurance company. It shows that the portion of the loss that was his personal loss is only $50. I have no objections, the jury being informed that he has sustained a $50 loss. I do object to having the jury learn the dollar cost of repairing the car because the [66] dollar cost isn't relevant—isn't probative to anything at issue.

MR. SEDGWICK: The fact that it was not repaired is the reason I cannot produce a bill. It was wrapped up as a total loss and the company's share of this was $1,453.11 and he has already testified that it was on a total loss basis not repaired.

MR. WYLAND: I have no objections to the jury being informed and I will stipulate that he has incurred $50 property damage loss. But I do object to the jury being told anything beyond that for the cash loss, of what the loss to his insurance may have been.

THE COURT: Do you want to say anything further?

MR. SEDGWICK: If it's a total loss, he has a right to the total figure, to what the full figure is.

THE COURT: I have to sustain the objection.

(In Open Court):

BY MR. SEDGWICK:

Q. Mr. Miller, you have testified that this car was two weeks old. What did it cost you? A. About $7,000.

MR. WYLAND: Your Honor, I object to that.

THE COURT: I will sustain the objection.

MR. SEDGWICK: Without Mr. Miller being discommoded, could we come to the bench again?

THE COURT: I agree with you.

[67] At The Bench:)

MR. SEDGWICK: I'd like to offer evidence through this witness that he paid so much for his car and that following the accident—well, revealing further that in the two weeks he owned the car he put on a certain mileage and then the accident occurred, following which he traded it in and I was going to ask what the salvage trade-in value got for it when he bought his new car. That's what I am trying to establish and that's my offer of proof.

THE COURT: I understood your evidence to be that he made a claim against the insurance carrier and the insurance carrier recognized his loss in the sum of $1400.

MR. SEDGWICK: But that has been objected to in our case.

THE COURT: That's right.

MR. SEDGWICK: And now I am forced by that fact to prove his total damage another way and I submit I can prove it through him with the figures that he paid for this car, the miles that he had on this car, the fact of the accident, his trade-in allowance on a new car, which he says he got, as determinative of his total loss as against a repair loss.

MR. WYLAND: This man's loss is $50. Mr. Sedgwick knows this just as well as I do. I will agree the jury can be informed it's $50.

MR. SEDGWICK: You are not making me any concession [68] by $50. It's no concern to me.

MR. WYLAND: Unfortunately that's the limit of your damage.

MR. SEDGWICK: I don't think it's the limit of my damage because I can show the total loss of the car through this witness and I can reveal through his testimony how much allowance he got for the salvage and tomorrow morning I can have an N.A.D.A. man down here to prove the value of that car.

MR. WYLAND: Your Honor, he has made a settlement with his insurance company. We have seen the Proof of Loss. We know that he had a $50 deductible.

THE COURT: The insurance company is not a party to the proceedings.

MR. SEDGWICK: And they weren't asked to be, therefore he has a right to collect all of it because they will not let that statement of the insurance company go in. If they let that go in, then I'd be bound on the other side of the coin by the amount that's reflected there.

THE COURT: I don't agree with you. I will sustain the objection.

MR. WYLAND: Thank you.

* * *

[77] MR. SEDGWICK: Yesterday, Your Honor, there was objection and objections sustained on my proffer or my questions pertaining to the loss and damage incident to the plaintiffs' car being involved in this accident. Counsel, as I recall it, was willing to stipulate to the deductible loss as shown on the Proof of Loss which is an identified exhibit in the case, because I don't like to run the risk of asking questions before a jury that there may be objection to. The questions which I now give in the form of proffered testimony, I have written down for the Court to view and the counsel to view before I actually ask them.

(Handing draft documents)

THE COURT: What do you say?

MR. WYLAND: These are the same questions he indicated he would ask yesterday.

THE COURT: That's right.

MR. WYLAND: And I object to for the same reasons I indicated yesterday.

[78] THE COURT: It was my thought if you were going to prove any damage to the car you should have some expert here who should be qualified to testify as to the value of the car before and after the accident.

MR. SEDGWICK: There is no person alive that can so testify. In other words, this car was totaled, as we say, meaning that it was not repaired but was traded in in its "as is" condition following the accident four months later.

THE COURT: Shouldn't there be some evidence as to its trade-in value other than what was actually allowed him for it.

MR. SEDGWICK: I know that where proof is obtainable along that line it's generally presented. It's not possible for me to prove this through any other witness. Therefore, I have to attempt it through the plaintiff himself in his answers to these particular questions. I submit that the damaged plaintiff has the right to state what he paid for this car, that this car, he said was two weeks old. I intend to ask him that it was not involved in any other accident at any time, that its mileage was not in excess of 1,000 miles and that he immediately entered into trade negotiations to get another car just exactly like it. He ordered one and it had to wait the time to get it from the factory and when the car arrived it was an identical car with one exception—the damaged car had [79] electrically operated, six-way seats in front where you can move the driver's seat in any position at a cost of $250. The car which was the replacement car came without that extra equipment. I am not quibbling primarily about the $250 represented by the only difference between the two

cars because both cars were 1966 Chrysler Imperials, so the replacement car was identical with the exception that the damaged car had electrically operated front seats for position, and that when he traded the car in, on the new car, his loss was between $1700 and $1800. That is the amount he had to add to get the new car. That is the testimony that I would like to develop and that's my proffer.

MR. WYLAND: Your Honor, I don't really know where to start. We know that this man had a $50 deductible collision policy. We saw the Proof of Loss yesterday which the loss was adjusted for $1400 some dollars, of which his share, that is the amount that he had to assume responsibility for was $50.

Now, if he didn't consider that to be full compensation, that was a matter for him and his own insurance company but that is his loss in this case.

Now, also we don't know, you see, we don't know that the car could not have been repaired for that amount. Mr. Sedgwick says it was a total loss but obviously it was not. This was a two-week old 1966 Chrysler Imperial. It would not have been adjusted on a total loss basis for $1400. If the man chose [80] to trade it in himself, he had to incur some additional expense—

THE COURT: What's your figure going to be for this last question?

MR. SEDGWICK: Between $1700 and $1800 is the exact difference, and that does not take into account the $250 electrically controlled front seat that the damaged car had.

THE COURT: I am inclined to reconsider my ruling of yesterday. I will overrule your objection and he may ask these questions.

* * *

[85] CROSS-EXAMINATION

BY MR. WYLAND:

Q. Mr. Miller, do you know of any reason why in the pretrial statement, filed on your behalf in this case, the damage to your car would be listed as $1,453.11? A. Yes, sir, I do.

Q. What reason do you have for listing that amount? A. I could have had the other car repaired for that amount of money, but I had purchased a new car. This car was two weeks and one day old. I didn't want a wrecked, two weeks and one day old car so I had to pay the additional amount of money to the garage owner to get a new car, another new car. I had bought a new car; I still wanted a new car. So that's where the difference comes in.

Q. The $1,453.11 which is in the pretrial order, that's the amount that you and your own insurance company agreed upon as the amount of damage to your car, isn't it? A. That's the amount we agreed upon without having to go to court to prove otherwise.

Q. That means you did not want to sue them? A. Oh, no, I didn't want to sue this time.

Q. Of that amount, only $50—

MR. SEDGWICK: Objection.

THE COURT: I will sustain the objection.

MR. WYLAND: May I say what it is that I want to [86] show by the answer?

THE COURT: You may come to the bench.

MR. WYLAND: Thank you.

(At The Bench:)

MR. WYLAND: If the Court please, the witness has testified to a loss of $1,990. He was reimbursed $1,453.11 of that.

THE COURT: Is that what you want to show?

MR. WYLAND: Yes, sir.

THE COURT: I will sustain the objection.

(In Open Court:)

BY MR. WYLAND:

Q. Did you bring with you, Mr. Miller, any records which would demonstrate the cost involved in the acquisition of a new car? A. No, sir, I did not.

Q. You used the term approximately $7,000 and approximately $1,990. Are you calling upon your recollection for those figures? A. Yes, I am. I believe the figure that I have given you would come nearer being lower than the actual record than to be higher.

Q. I am sure that's so.

Do you still have the records relating to the transaction of your automobile? [87] A. I am not real sure whether we do or not. I think so, though. However, we have had an office fire since this accident, so part of the records in our office fire have been destroyed so I can't answer that question for sure.

Q. Mr. Miller— A. We probably could get the records from the garage where I traded.

* * *

BY MR. WYLAND:

Q. At the time this accident occured, Mr. Miller, did you know what street you were on, by number? A. That's a hard question to answer. I believe so, though, because we had mapped out our route on a Washington city map prior to leaving the Shoreham Hotel. So I believe that I knew we were on 7th.

[88] Q. You testified yesterday that you saw Mrs. Orem's car approaching at a speed of from 40 to 50 miles an hour? A. Yes, sir.

Q. Can you tell us where your car was with respect to that intersection line or that curb line the first time you saw her car? A. We were in the intersection when I saw three cars, not just hers, but three cars coming. The lead car is the one that hit us.

Q. You were already in the intersection? A. Already in the intersection.

Q. Can you tell us how far into the intersection the front of your car was at that time? A. Just entering the intersection.

Q. But the front of the car was across the intersection line? A. Yes, sir.

Q. Can you tell us how far from the intersection the Orem car was at that time? A. Things happened pretty fast then, but I'd say a couple of car lengths—maybe three car lengths.

Q. She was that far back from the curb line? A. Yes.

Q. On her side of the intersection? [89] A. Yes, sir.

Q. Could you tell then what lane of traffic she was in? A. I think so. She was in the lane of traffic next to the dividing median, next to the line of traffic going in the opposite direction.

Q. She was in what would be her extreme left hand lane? A. That's correct, and so were we.

Q. You also were in the last lane to the left on the southbound portion of 7th Street? A. That's correct. However, when the cars got still, our car was turned in the opposite direction and was not in that same lane. It was in a lane closer to the curb or had been moved to our right, it would be west from the lane we were in.

Q. The direction of your car as a result of the impact was to its right, or towards the west? A. The front of our car was knocked to the west, that is correct.

Q. When you saw Miss Orem's car coming, did you realize right then that there was going to be an accident? A. Oh, yes.

Q. What did you do? A. All I could do is just exclaim and holler out that the car was going to hit us. That's all I could do. There was nothing else I could do. After all, I was on the extreme [90] right. I wasn't in control of the car. I wasn't driving it.

Q. Do you know whether Mr. Cooper saw her car also? A. I feel sure that he did.

Q. No. I say, do you know whether he did or not? A. I would have no way of knowing that.

Q. You didn't see or experience any activity on his part that would indicate to you whether he did or not? A. Well, any normal person—

THE COURT: No, that's not the question.

BY MR. WYLAND:

Q. Did he apply his brakes before the impact? A. I don't think anyone had time to apply the brakes.

Q. Did he attempt to make any swerving motion? A. It's hard to say. I'd hate to make a direct answer if I don't really know, and I don't know, so—it would have been a practical impossibility for any car to have penetrated that intersection from the east going west without hitting somebody's car, because there was a car in front of me—we were there (indicating) and there was the car in back of us.

Q. You say the car ahead of you was two or three car lengths ahead of you? A. I'd say about two car lengths about, yes.

Q. You said yesterday, as my notes indicate, two or three? A. It could have been.

Q. Is that right? In your judgment how long is a car? A. Approximately 18 to 20 feet.

[91] Q. So if it were three car lengths it would be about sixty or seventy feet or if it were two if would be about forty feet? A. It About forty, thirty-eight to forty feet.

Q. Which lane of traffic was that car ahead of you in? A. It was more than one car.

Q. Well, the nearest one ahead of you? A. The nearest car was in the center lane of the southbound traffic.

Q. That would be the lane to your right? A. That's right.

* * *

[92] Q. Did you ever see her car again? A. The only time that I saw her car was prior to the impact, and then after the cars were all still and her car was stopped against the side of the tree, but I didn't see her car any time after that at all.

Q. When you saw her car stopped against the tree what part of her car were you looking at? A. The side of her car, I think.

Q. Do you recall which side? A. No, I don't, I don't know.

Q. Did you see any damage to her car? A. No, I was too far away and it was too black a night. Too dark.

Q. Street lights were not on? A. Street lights were not on. It would have been impossible for anybody to tell at that distance what was damaged [93] on her car and what was not.

* * *

[94] Q. Your bills indicate that you had some physical therapy at Rowan Memorial Hospital. Is that the one in Salisbury— A. That's correct.

Q. —beginning on June 29, 1966. Did you have any treatment anywhere before that? A. I went to see Dr. Feezor prior to that time.

Q. But you didn't have any therapy anywhere until June 29th? A. No, that's the only place I had therapy—was there.

Q. I noticed the last therapy you had according to the bill was a visit on March 16, 1967. Is that the last treatment you have had? A. I believe it was later than that, but I would have to go back to the record to prove it.

Q. The bill also indicates, Mr. Miller, that in 1966 you only had two treatments, one on the 29th and one on the 20th. Then you didn't return until March 3, 1967; is that correct? A. I don't think so. There must be something wrong with the bill.

[95] Q. The bill is in error? A. Well, I am not looking at it. You are, so—but it's my recollection that it was not that long. After all, this has been four years, right?

Q. You have had the suit pending for three years, haven't you? A. Thereabout.

Q. Did you have any treatment anywhere between June 30 of 1966 and March 3 of 1967? A. Let me look at that bill a minute. (Examining bill) You also have a bill from the hospital itself other than the physical therapy department?

Q. Those are the bills that your counsel offered. I have no other bills. A. (Examining bills) Well, there are other bills somewhere from Dr. Feezor and Dr. Ira Wentz treating me in the emergency room.

Q. We have a bill from Dr. Wentz which I will show you. That's a bill for $6, isn't it? A. That's a bill for $6, but I am sure he didn't manipulate all my shoulder and put those needles and all that in the emergency room in the hospital for any $6.

Q. Well, we have the hospital bills here but they don't indicate any needles. A. That was from the physical therapy department only.

[96] Q. There should be another bill? A. There should be. The regular hospital bill wouldn't be indicated on that at all. (Indicating) So there should be another hospital bill somewhere.

So at the time that I was suffering such awful pain with my shoulder, arms, and neck is when Dr. Feezor met me at the emergency room at the hospital and then called in Dr. Ira Wentz. That's the first time Dr. Wentz had seen me, was at that time. He called in a special bone doctor.

Q. So there should be another hospital bill? A. Should be another hospital bill.

Q. And there are other visits to the therapy department that are apparently not recorded on this bill? A. That's right. Dr. Wentz sent me over there for it.

Q. Dr. Wentz sent you over for them? A. That's right. I have a complete medical report from Dr. Wentz if you want to see it.

Q. I am sure your counsel will take care of that, thank you.

MR. SEDGWICK: I have no objection.

MR. WYLAND: Those are all the questions I have.

* * *

[98] Q. Mr. Miller, I hand you now what has been marked for identification Plaintiff's 5. I ask you if that is a bill covering treatment by Dr. Feezor, whom you have described as your family physician— A. Yes, sir.

Q. Wait a minute—treatment of you as a result of the accident that occurred in Washington, D.C.? A. Yes, sir, it is.

Q. Would you state the amount of it, please, sir? A. $30.

* * *

[107] DIRECT EXAMINATION

BY MR. SEDGWICK:

Q. Officer Tino, please tell us your full name. A. It is no longer "Officer Tino"; it is "Mr. Tino."

Q. You are no longer on the force? A. That's right. I am retired.

* * *

Q. We are concerned here with an accident that occurred on May 8, 1966. You were a member of the Metropolitan Police Force at that time? A. Yes, I was, sir.

Q. In what capacity? A. I was attached to the Accident Investigation Unit, Metropolitan Police Department.

[108] Q. How long prior to the date of this accident, were you a member of the A.I.U.? A. The accident happened in 1966, and I think I was assigned to the Accident Investigation Unit in '60 or '59.

* * *

Q. In relation to this accident, you did not see the collision, did you? A. No, I did not.

Q. Have you any way of knowing, either from your memory or from your record, about what hour of the day or night it was that you got the message that there was an accident at 7th and Independence Avenue, to which you responded? A. Yes, I have it on my notes.

[109] Q. What time did you receive the call? A. I received the call at 8:21 p.m. I arrived on the scene at 8:26 p.m.

* * *

Q. What kind of weather was it at that time and earlier? A. I have on my notes, "raining."

Q. Street surfaces wet? A. Street surfaces wet—good—and surfaces, asphalt.

* * *

Q. When you got there, did you see two cars that apparently had been involved in an accident, one referred to [110] as the Miller car and one referred to as the Orem car? A. Yes, I did.

Q. Where was the Miller car when you first observed it on your arrival at the scene? A. That would be Vehicle Number 1, and it was—I determined it was 19 feet after point of impact. That would be placed in the intersection of 7th and Independence Avenue.

Q. The car was still in the intersection, was it, when you got there? A. That's correct.

* * *

[111] Q. All right, sir. As to the Orem car, you have identified her by name, where was her car when you arrived? A. Her car was on the southwest—on the sidewalk on the grass.

Q. On what street? A. On Independence. And I determined her vehicle went 115 feet after the point of impact.

Q. I will come to that a little bit later. I only want to know now just where her car was, as you recall it, or [112] as your original notes reflect it— You said on the sidewalk on Independence Avenue— A. —on the south side.

Q. On the south side of Independence Avenue. A. Yes.

Q. I take it, west of Seventh Street. A. Yes, west of Seventh Street.

Q. Was there a tree knocked down there? A. Yes, there was.

Q. By her car? A. That's correct, and I have a picture of that (indicating).

Q. When I say what kind of a tree, I don't mean as to whether it is an elm or an oak, but the size, essentially. A. It's a small tree.

Q. It was knocked over, was it? A. Yes.

Q. Did you go over to the tree and to her car? A. Yes, I did. I took pictures of it.

Q. After the tree had gone down, where did her car end up? A. Well, the pictures will show her car still on top of the tree.

Q. Oh, I see. May I see the pictures, please, sir? A. Yes, you may. That's her car (indicating); that's [113] the tree.

MR. SEDGWICK: Suppose I take all the pictures and maybe I can save time, Officer.

THE WITNESS: Surely.

MR. SEDGWICK: May these photographs be marked for identification?

THE COURT: Give each a separate number for identification.

THE CLERK: Plaintiff's Exhibits 6 through 16 marked for identification.

(Plaintiff's Exhibits 6 through 16 marked for identification.)

BY MR. SEDGWICK:

Q. Officer, I will hand you what has been marked for identification Exhibits Numbers 11 through 16, 6 pictures and ask you if all those pictures are in relation to the Orem automobile? A. (Examining photos) Number 11 is not. That's an Imperial.

Q. I'm sorry. You're correct. Then, the five pictures that you have— Do you have 5, 12 through 16? A. Twelve through 16.

Q. They are of Miss Orem's Pontiac car? A. That's correct.

[114] Q. Handing you the remaining pictures of this exhibit, are they all of the Chrysler car of Mr. Miller? A. That's correct, sir. I can answer that—where I parked my scout car, because I can see it in the picture now.

* * *

Q. So, you set up your camera and you took these pictures. In the photographs concerning the Orem car, all of them, to a greater or lesser extent, seem to show a tree. Is that the tree you refer to as being the one that was knocked down? A. That's correct.

Q. Seventh and Independence Avenue at that time had a maximum speed limit, did it not? A. Twenty-five miles an hour is the speed limit at Seventh and Independence.

[115] Q. Within the 25-mile zone. A. That's correct.

Q. What was the condition of the traffic lights, the automatic signal control lights? A. The traffic lights were not working.

Q. Why was that? A. Probably from the rain storm. I don't know. But they were not working.

Q. Don't you recall that there had been preceding this time a violent electrical storm that knocked out all the lights? A. There was an electrical storm, and I say it could have been from that.

* * *

Q. Officer, at a later time than at the scene of the accident, did you talk to Miss Orem? A. Yes, I did.

* * *

[116] Q. Did you ask her where her car was at the time she first became aware of danger? A. Yes, I did.

Q. What was her answer? A. "At the point of impact."

* * *

THE COURT: Are you offering these pictures in evidence?

MR. SEDGWICK: Yes, indeed.

THE COURT: You haven't done it.

MR. SEDGWICK: I was going to do it a little bit later.

* * *

DIRECT EXAMINATION

BY MR. WYLAND:

Q. Did you take any measurements at the scene of the accident? A. Yes.

Q. Did you draw a diagram at the scene of the accident? [117] A. Yes, I did. I have it here.

Q. Is the nature of the diagram such that you could reproduce it on the blackboard for us? A. Yes.

* * *

Q. Do you have the width of those streets, Officer? A. (Drawing upon blackboard.)

THE COURT: Are both feet?

THE WITNESS: Yes, your Honor.

BY MR. WYLAND:

Q. Seventh Street being 76 and Independence being 80? A. That's right.

[118] Q. That's the measurement from curb to curb? A. That's right.

Q. I will ask you to indicate on there where the Orem car was when you arrived on the scene? A. (Indicating)

Q. Do you have the measurement that it was from the corner? A. No, I do not have that measurement. I have from the point of impact.

Q. Were you able to determine the point in the intersection where the two cars had made contact with each other? A. Yes, from the debris in the street.

THE COURT: I didn't hear you.

THE WITNESS: From the debris on the street and the skid marks.

BY MR. WYLAND:

Q. Did you make measurements from the curb lines to that point of impact? A. Yes, I did.

Q. Would you fix that point of impact for us? A. (Drawing)

Q. What distance is that from the north curb of Independence Avenue? A. South to north is 23 feet.

Q. What distance from the west curb of Seventh Street [119] was that point? A. I will have to use mathematics. I always take measurements from the direction of the cars, which they were coming from. 80 deduct 66 is 14 feet.

Q. Indicate where the Miller car–

THE COURT: Excuse me. You said "14 feet"? Seventh Street is 76 feet.

THE WITNESS: I deducted it from the wrong one. It should be deducted from here.

THE COURT: So, it would be ten feet.

THE WITNESS: 10 feet, right.

* * *

Q. Were you able to identify any skid marks leading up to the point of impact from either of these cars? A. Skid marks from the point of impact to the car going south.

Q. How long were those skid marks? A. Nineteen feet. That's not to scale, but it was 19 feet to the point of impact.

* * *

[120] Q. So, the Orem car was facing sort of northeast and the Miller car, sort of northwest? A. That's correct. You can see that in the pictures.

* * *

Q. Were these photographs of the car taken before either car had been moved? A. That's correct.

Q. Are these notes you made at the scene of the accident? A. Yes, they are.

Q. (Examining notes.) What is this note here: "Operator 2 fell out 47 a.p.i."?

MR. SEDGWICK: I object to that on two grounds: First, because it is leading. Secondly, because the officer does not know where she fell, as far as anything up to now has been concerned.

THE COURT: I will overrule the objection.

BY MR. WYLAND:

Q. What does that note mean? [121] A. When I arrived on the scene, Operator Number 2 was on that island, and I measured it after she was taken to the hospital. That was 47 feet from the point of impact.

THE COURT: Operator what?

THE WITNESS: Operator Number 2, which is Miss Orem.

BY MR. WYLAND:

Q. Referring to the median island on the west side of Independence Avenue— A. That's right.

Q. —so that's where Miss Orem was and her automobile was over on the side here? A. That's correct. She was lying on the island.

Q. I notice photograph which is numbered Exhibit No. 9, the street lights were on. Were they on when you arrived on the scene? A. Yes, they were. You can see them in the pictures.

Q. The traffic lights were out? A. Traffic lights were out.

Q. Did you have any conversation with the operator of vehicle Number 1, that's the Miller car? A. Yes, I did.

Q. Did you ask him how far he was from the Orem car when he saw it?

MR. SEDGWICK: I have no objection to the question being asked. I object to its being answered. This man is dead.

[122] THE COURT: What did you say?

MR. WYLAND: He is the agent of Mr. Miller.

MR. SEDGWICK: He is not agent, for purposes of any statements or conversation.

THE COURT: He was an employee of Mr. Miller's, was he not, and driving the car for Mr. Miller?

MR. SEDGWICK: He was the chauffeur of Mr. Miller's car on the occasion in question, yes.

THE COURT: I will overrule the objection.

BY MR. WYLAND:

Q. What did the operator say with respect to how far away he saw the Orem car? A. (Examining document) I asked him when he first noticed danger. He said, "Did see before I hit. Can't recall the distance."

Q. Did you ask him what his speed was at the time he saw the Orem car? A. Yes, I did.

Q. What did he tell you? A. About 20 miles per hour.

Q. Did Mr. Cooper indicate where he was going at the time? A. He stated to me that he was looking for Maine Avenue. "I saw a car come out. I applied brakes. I'm from out of town."

[123] Q. That's the statement Mr. Cooper made to you? A. Right.

* * *

CROSS-EXAMINATION

BY MR. SEDGWICK:

Q. You spoke about the brake marks of the Miller car being 19 feet in length. A. Yes.

Q. Would you tell me, if you can, about the length of the Chrysler Imperial automobile over-all length? A. What year is that, '66? It averages from 18 to 20 feet.

Q. Now, Officer, in regard to Mrs. Orem and her car, you have indicated it is down here (indicating). Did you question her as to how fast her rate of speed was-as to her statement? A. Yes, I did.

Q. What did she tell you? A. She said she was going 20 to 25 miles per hour.

Q. Did she tell you anything about that she was accelerating going through the intersection? A. Nothing about accelerating, sir.

Q. Did she put down any brake marks indicating that she [124] had attempted at any point to stop her car, or to avoid an accident? A. No, she did not because she stated she was in the middle lane and did not see the car.

Q. There were no marks by her car indicating that she had attempted to stop or turn out? A. That's correct, because she did state she first saw the car at the point of impact, so she didn't see the car before then.

Q. Officer, I wonder if you could—first, if you have a note or recollection, or if you could approximate your best judgment of where, in relation to the median strip, you talked to her. A. I did not talk to her on the street.

Q. Oh, I see. I thought you said you went over to her. A. Yes. A person is injured and I try to help him. I get an ambulance and help 'em put 'em in the ambulance.

Q. I'm not complaining, but I mean, where was she when you talked to her? A. I think I answered that. She was—I measured 47 feet from the point of impact.

Q. Now, this would be the point of impact (indicating)? A. That's the point of impact.

Q. Did you measure diagonally to wherever she might have been? [125] A. Straight—one line.

Q. You didn't measure it at an angle to get to where she was? A. No. From the point of impact, with a roller tape.

* * *

[126] VIRGINIA OREM

Defendant herein, was called as a witness on behalf of the Plaintiffs, and having been first duly sworn, was examined and testified as follows:

MR. SEDGWICK: If the Court please, at this time I wish to offer in evidence the Defendant's deposition, questions and answers put to her on September 10, 1968, limited to pages [127] 8, 9, 10, 27, 28 and 30, and I shall develop those separately now by questions to her.

* * *

DIRECT EXAMINATION

BY MR. SEDGWICK:

Q. Miss Orem, do you recall the time when your deposition was taken on September 10, 1968? A. The time of day? Do you mean the time of day?

Q. No. Do you recall the event? A. I remember your taking it.

Q. That the deposition was taken? A. Yes.

Q. Your lawyer was present. A. Yes.

Q. I ask you now whether these questions were put to you and you gave these answers, reading from almost half-way down on page 8:

[128] "Q. On Independence Avenue proceeding west, how many lanes of traffic are there? A. Six lanes

"Q. Just proceeding west? A. Three.

"Q. Which lane were you in? A. The middle of the third lane.

THE WITNESS: The through lane, t-h-r-o-u-g-h lane. They made a mistake in it.

BY MR. SEDGWICK:

Q. Well, it says here, "the middle of three lanes." You were not in the middle of three lanes? A. –of the *through* lane. There are four, including the curb lane on Independence. I was in the middle of the three or *through* lanes.

Q. You are familiar with this area by reason of your work and the frequency back in other years going to and from, on this particular route? A. Yes.

Q. Perhaps you can tell us whether there are car tracks along that street, on Independence Avenue? A. There are not on that portion. I think the street car used to turn on Seventh Street and Independence going west, and on the east side, I don't remember car tracks.

[129] Q. But you were coming from Sixth Street? You were coming from east to west, so between Sixth and Seventh Street, as you came along, one block to where the accident happened, are there not car tracks there? A. I don't remember any.

Q. Were you asked this question? "Q. What was the weather like? A. Drizzly, darkish, foggish.

"Q. Was it raining at the time of the accident? "A. Just drizzling slightly.

"Q. Were there any traffic signals located at this intersection? A. Yes.

"Q. Were they operating? A. No.

"Q. Were they totally out? A. Yes.

"Q. What was your speed as you approached the intersection? A. 20 to 25 miles per hour.

"Q. Taking the beginning of the intersection for you, where were you located in approximation of distance, when you first saw the other vehicle? A. Five lanes through the intersection, approaching the last lane.

[130] "Q. Was that when you first saw it? A. Yes.

"Q. You never saw it up to that time? A. No.

"Q. Were your windshield wipers working? A. Yes.

"Q. Were all of your windows up? A. Yes.

"Q. Was there anything that hindered your vision at all as you approached the intersection? A. No.

* * *

"Q. As you approached this intersection, what would be on the right-hand corner in the way of buildings or anything of that nature, the first corner that you came to as you approached the intersection? A. On the right, at the time that this accident happened there was a temporary government building, temporary building.

"Q. Was there any type of obstruction at all on the corner that would have prevented you from seeing across the corner? [131] A. No.

* * *

MR. SEDGWICK: I have a few short questions, Miss Orem. "You testified in response to questions asked by Counsel that you did not see the other car involved in the accident until a split-second before the accident occurred when the other car struck you on your right, the right side of your automobile. As you approached the intersection, did you look to your left and to your right? A. I did.

"Q. Did you see anything to your left or to your right? A. I did not."

MR. SEDGWICK: Omitting something I am not concerned with at the moment, your Honor.

"Q. Did you see any headlights, automobile headlights when you looked to the right as you approached the intersection? A. No, I did not."

* * *

[132] "BY MR. SCANLON:

"Q. If my recollection is correct, Miss Orem, you testified at one point after entering the intersection, your foot went from the brake to the accelerator. Is that right? A. It is.

"Q. Was there any perceptible increase in the speed of the car after your foot went back on the accelerator? A. Just the average increase for such a short distance.

"Q. Was your speed exceeding 25 miles per hour at that time, if you know? A. No, no."

MR. SEDGWICK: That completes the deposition inquiry. I now offer in evidence Traffic Regulations which have been itemized in the Pre-Trial Order.

* * *

THE COURT: Do you want to ask her anything?

MR. WYLAND: With respect to the deposition, I would like to read page 28, the question and answer which Mr. [133] Sedgwick omitted, the second question.

"Q. The split second before the accident, when you said you did see the other car, what did you see of the other car? A. The big brown hood."

* * *

I offer in evidence the following traffic regulations:

THE COURT: Will you come to the bench?

(At the Bench:)

THE COURT: What are they?

MR. SEDGWICK: One regulation is 21-A.

* * *

[134] THE COURT: Generally, I don't have them read to the jury, but I read them to the jury as part of my charge. If you want to read them, I think you have a right to do so.

MR. SEDGWICK: I wish to have the regulations identified and your Honor rule on them irrespective of at what point later on we present them to the jury, because I wish to make a motion at the end of my entire case.

MR. WYLAND: I object to 21-A. 21-A is a reckless driving instruction.

THE COURT: I will overrule the objection.

MR. SEDGWICK: 22-A.

MR. WYLAND: I have no objection to it.

MR. SEDGWICK: 28.

MR. WYLAND: No objection.

MR. SEDGWICK: 46-A and B.

THE COURT: Right-of-way.

MR. WYLAND: Uncontrolled intersection. I object to that one, Your Honor, because the evidence thus far—Well, that's all right. I intend to offer it anyway. I will withdraw my objection.

MR. SEDGWICK: 99-C.

MR. WYLAND: No objection.

MR. SEDGWICK: And that completes the Plaintiff's regulations.

THE COURT: Very well. They will be received.

* * *

[137] Whereupon,

ALLEN L. STATON,

called as a witness on behalf of defendant, having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WYLAND:

Q. Mr. Staton, tell us your name and home address. A. My name is Allen L. Staton, 832 Mohican Street, Charlotte, North Carolina.

Q. What is your employment, Mr. Staton? A. Employed as Claims Representative for American Mutual Liability Insurance Company.

Q. Where is your office located? A. Charlotte, North Carolina.

Q. For how long a time have you been so employed? A. Since January of 1963.

Q. Were you so employed in September of 1966? A. I was.

Q. In connection with your employment as Claims Representative, did the claims of Boyd and Hallie Miller come to your attention? A. They did.

Q. Would you tell me, please, when you first had some [138] connection with those claims? A. During the early morning hours of September 1, 1966.

Q. Will you tell us the circumstances under which you happened to become involved? A. The matter was referred for my handling in the Charlotte area by our Washington office.

Q. What was it that you were supposed to do? A. To contact the people in the Miller car.

Q. Did you do that? A. Yes, sir, I did.

Q. I would like to ask you with respect only to Mr. Miller– Mr. Boyd Miller– Well, let me ask you: Were you able to contact Mrs. Miller? A. No, sir.

Q. Did you contact Mr. Miller? A. Yes, sir.

Q. Where did you contact him? A. In his office in Salisbury, North Carolina.

Q. Can you tell me when? A. Approximately 9:30 a.m. on September 1st, 1966.

Q. Who was present at the time? A. Well, of course, Mr. Miller and I cannot remember exactly, but I believe that a Mr. Cooper was present during the time that I talked with Mr. Miller.

[139] Q. Did you have a conversation with Mr. Miller about the accident that happened up here in May of '66? A. I did.

Q. Did Mr. Miller make a statement to you about it? A. He did.

Q. What kind of a written Memorandum of that conversation did you make? A. Well, it was a two-or three-page statement that I took from Mr. Miller regarding the accident details as he remembered them, which he read and signed.

Q. Is that a handwritten statement? A. Yes, sir.

* * *

BY MR. WYLAND:

Q. Let me show you what has been marked Defendant's Exhibit No. 1. I would like to have you take a moment and look at it and let me know when you are ready. A. (Examining document) Ready.

Q. Is that the statement you took at your meeting with Mr. Miller? A. Yes, sir.

[140] Q. Would you explain to the ladies and gentlemen of the jury how it is that you go about getting a statement of this kind. A. Well, it is with the consent of the party involved, of course. Certain questions are asked and certain answers given, and these answers and questions are then put in the form of a written report which the party reads and acknowledges that he has given a statement and signed it.

Q. Is the statement actually written out by you? A. Yes.

Q. Is it signed by Mr. Miller? A. Yes.

Q. Were you present when Mr. Miller signed it? A. Yes.

Q. You actually saw him sign it? A. Yes.

Q. Did you see him read it before-hand? A. Yes.

Q. Is there any particular reason why you recall this—why you are so quick to answer? A. Well, as I remember, Mr. Miller was very careful about what he said, and what he wanted put into this statement, and was very meticulous in all respects while I went about trying to put his words in my words in the form of a written report which would be acceptable to him.

[141] Q. Did you have Mr. Miller sign each page? A. I did.

Q. In your discussion with Mr. Miller did you ask him how this accident occurred? A. Yes, sir.

Q. And did you ask him whether he had ever seen the Orem car before the accident.

* * *

MR. SEDGWICK: If the Court please, may we come to the bench a moment?

THE COURT: Yes.

(At the Bench:)

MR. SEDGWICK: I have no objection to the statement in its entirety, with the deletion of the following last [142] sentence—and the following last sentence does not relate to any issue in the case, and that's my reason for objection:

I don't know if the driver of the other car was charged with any violation or not. Mr. Cooper had not had anything to drink, to my knowledge. I had had a couple of drinks, and this is why I was not driving."

Alcohol has not been an issue in the case at any time, and so with that deletion of what I have just now read, I have no objection to the statement.

* * *

[144] Q. Mr. Staton, did you ask Mr. Miller where the Orem car was when he first saw it? A. Yes, sir.

Q. What did he tell you? A. He said he never saw the car prior to the impact of the two vehicles.

Q. Was there any discussion between you and Mr. Miller with respect to the speed of the Orem car?

* * *

A. Yes, sir.

Q. What did he tell you with respect to its speed? A. He said the other car had to be going from 40 to 50 miles per hour because of the distance it traveled after [145] the impact.

Q. Did you also ask Mr. Miller some questions about the injuries that he and his wife had suffered? A. Yes.

Q. During your meeting with Mr. Miller was he cooperative with you? A. Yes, he was.

Q. And the others, you say, who were there were Mr. Cooper—Was anyone else there? A. Mr. Miller's son. I believe his name was William.

Q. You said that you were not able to make contact with Mrs. Miller. Why was that? A. Mr. Miller requested that I not contact any of the ladies in the car, that they could not materially add anything to what he had told me, and what Mr. Cooper had told me, and what his son had told me.

MR. WYLAND: Thank you.

Your witness.

CROSS-EXAMINATION

BY MR. SEDGWICK:

Q. Mr. Staton, how long have you been employed by American Mutual Liability Insurance Company? A. Since January '63.

Q. In all those years, were you in the Claims Department? A. Yes, sir.

[146] Q. Your duties in the Claims Department consisted of investigating accident cases? A. Yes, sir.

Q. And taking statements? A. Yes, sir.

Q. When this file was sent from your Washington office, down to you in Salisbury, which you dated as approximately September 1, 1966, were you under any instruction from your company to interview Mr. and Mrs. Miller and secure their signed statements, if you could secure them? A. Yes, sir.

Q. You did not pursue the matter of trying to get Mrs. Miller's signature to any statement after Mr. Miller told you that he preferred that you not contact any of the ladies? A. No, sir, I never saw Mrs. Miller.

Q. Would you be taking your orders in that respect from him or from your company, to get statements? A. Well, I am supposed to contact everyone that is involved. I can't force myself upon anyone. I can only do what I can do in the performance of my job.

Q. The overall total interest that you had in your mind when you went on your journey to talk to Mr. Miller and Mrs. Miller, if possible, your interest was totally in behalf of your company, wasn't it? A. Yes, sir, in behalf of my insured or our insured—[147] on behalf of the lady we insured and my company, yes, sir.

Q. You engaged Mr. Miller in conversation, the mechanics of which you were asking him questions and he was giving you answers, and then you write down in your words what you say his answers were? A. Yes, sir, essentially that's correct.

Q. After you had finished writing down in your handwriting the entire statement, you submitted it to him for signature? A. Yes, sir.

Q. —and for prior reading before he should sign it? A. Yes, sir.

Q. Did you explain to him the ultimate purpose that you or your company might have in mind in securing from him, an adverse party to Miss Orem, his signed statement? A. I didn't understand the question.

* * *

Q. Did you inform him that he was an adversary party to your interest? A. I think he knew that.

Q. Whether he knew it or not, did you inform him the use to which you might ultimately put this statement? [148] A. No, sir, I asked him to give me a statement regarding the details of the accident, which he consented to do.

* * *

Q. Reading the statement verbatim:

"September 1, 1966

"Salisbury, North Carolina,

Page 1

"My name is Boyd C. Miller and I reside at 1123 West Henderson Street, Salisbury, North Carolina. I get my mail at Box 1566, Salisbury, North Carolina. I am a 55-year-old male and president of Miller Equipment Company of Salisbury, North Carolina.

"On May 8, 1966, shortly after dark, my 1966 Imperial was involved in an accident at the intersection of Seventh Street Southwest and Independence Avenue, Southwest, Washington, D. C. This accident involved also a 1959 or 1960 Pontiac convertible operated by Virginia Orem. My car was being operated by Samuel Cooper, an employee of mine. I was sitting on the right, front seat. My wife was riding in the middle of the front seat. My son, William E., his wife, Nancy, and Mrs. Cooper were riding in the rear seat. We had gone to Washington on business to attend the annual meeting of the American Ceramics Society. The program was to start on May 9, 1966.

[149] "We had checked in at a hotel, and at the time of this accident we were on our way to eat dinner. We were traveling south on Seventh Street. This is a four-lane street, and we were driving in the inside south-bound traffic lane.

"Before we"—now I start with page 2—"left the hotel, a bad thunder and lightning storm developed with heavy rain. It had begun to subside as we left the hotel. The lights at the hotel were not out when we left. The street lights were out and the traffic lights were not working in the street where this accident occurred.

"We were in heavy traffic as we approached the intersection of Seventh Street and Independence Avenue. The traffic ahead of us was proceeding right on through this intersection, even though the traffic light was not operating. Mr. Cooper did not stop before en-

tering this intersection because there was no reason to stop. As we got to approximately the center of the two west-bound lanes of Independence Avenue, the left front of my car and the right front of this Pontiac collided. The impact turned my car from left to right, completely around, and it stopped, headed north in the intersection. This Pontiac proceeded on past the intersection, crossed the two east-bound lanes of Independence Avenue, and stopped after striking a tree on the south side of Independence Avenue. This car traveled about"–and now I start on page 3–[150] "about a half a block or more before coming to a stop. The driver of this car was thrown out. I did not see this Pontiac prior to this accident. Mr. Cooper had the headlights on. It was not raining at the time of the accident, but the street was still wet. The only lights on were lights from car head lamps. I think my car entered the intersection first. I would guess that the speed limit here was 35 miles per hour. Mr. Cooper was driving about 15 miles per hour. This other car had to be going 40 to 50 miles per hour because of the distance it traveled after the impact.

"I sustained a back and neck injuries in the accident. My wife sustained eight broken ribs, a broken collar-bone, and injuries to her left shoulder and left arm. Mr. Cooper sustained a cut on his head. My son, his wife nor Mrs. Cooper were injured.

"Mr. Cooper, my wife and myself were treated at Casualty Hospital. My wife was admitted and removed in two or three days. I had a private plane, and we came home at the end of this period. She remained in bed at home."

Page 4 we agreed to delete.

THE COURT: Yes.

MR. SEDGWICK: That completes my examination of the witness.

* * *

[151] MR. WYLAND: I call Miss Orem, your Honor.
Whereupon,

VIRGINIA ELIZABETH OREM

defendant herein, was called as a witness in her own behalf, and having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WYLAND:

Q. Miss Orem, would you tell the ladies and gentlemen of the jury your name and home address? A. My name is Virginia Elizabeth Orem. I live at 4811 South 31st Street, Arlington, Virginia.

Q. What is your occupation? A. I am a desk officer for Burma-Thailand and the Philippines in the Bureau of Educational and Cultural Exchange in the Department of State.

* * *

[152] Q. Was anybody with you in your car? A. No.

Q. What kind of a car was it that you were operating? A. I had a Pontiac convertible, Bonneville.

Q. What year car? A. '59.

Q. Where were you coming from at the time the accident occurred? Where had you been and what route had you followed—that sort of thing? A. Well, early in the day, I had been up at Brighton and Tridelphia Lake. It's quite a distance from Olney, Maryland, and I had gone down Georgia Avenue and Seventh Street, and I had turned left and gone up to 38th and Alabama, and I had let a friend out and then I had come back down Independence.

Q. Will you tell the jury what the weather was like as you were approaching Seventh and Independence Avenue? A. It was drizzly, darkish; there was still some vision, a little foggish, misty.

Q. Was it fully dark yet? A. No.

[153] Q. Were you operating with your headlights on? A. Yes.

Q. Were other cars generally operating with theirs on? A. All that I saw had their headlights on.

Q. Had you been through the intersection of Seventh and Independence before? A. Many, many times.

Q. Did you know as you approached it that it ought to be controlled by traffic signals? A. Yes.

Q. Did you see those signals when you came up to it? A. Well, there were none on. I probably saw the post.

Q. I asked it badly: Did you recognize, as you came up to the intersection, that the traffic signals were not operating? A. Yes.

Q. Were the street lights on? A. Yes.

Q. On the diagram we have on the board, the police officer has divided the street that you were on, that is, Independence Avenue. You were traveling west, were you not? He has divided the west-bound portion of it into four lanes. What is this first lane? A. That would be the curb lane.

[154] Q. How many driving lanes were there that you were aware of? A. There are three driving lanes, or through lanes.

Q. In which of those three lanes were you traveling? A. I was in the second one from the curb.

* * *

Q. As you came up to the Seventh Street, Miss Orem, were you following any other car? A. Absolutely not.

Q. Were there any cars in back of you that you knew about?

[155] A. Not that I saw.

Q. As you were coming up to that intersection, at what speed were you traveling? A. 20 to 25 miles.

Q. Is there any particular reason why you were not traveling faster? A. That's the speed limit, and the weather conditions.

Q. Did you ever look to what would have been your right, to see if there was any traffic approaching the intersection from Seventh Street? A. I did.

Q. Can you tell the members of the jury where you were with respect to the intersection when you looked to your right? A. As I was approaching the intersection, before I actually entered.

Q. When you looked, what did you see? A. Nothing.

Q. Did you look to your left also? A. I did.

Q. Was there anything to your left? A. Nothing.

Q. Did you ever see any southbound traffic on 7th Street going through the intersection? A. Not at the time I was approaching—not near.

[156] Q. With specific reference to the testimony of Mr. Miller that there was traffic ahead of their car as they entered the intersection, my question is, did you see any such traffic? A. Absolutely not.

Q. What part of your car was involved in this accident? A. The right side, more to the middle.

Q. Can you tell the jury what happened to you, your person, as a result of this impact? A. Well, shortly after the impact—or it may have been immediately—my head hit something, and I was gradually losing consciousness because I do remember my hands not—I wasn't able to hold the steering wheel.

Q. The officer has indicated your car came to rest on the south curb of Independence Avenue, is that correct? A. Yes.

Q. Where were you when you first recollect—the first recollection you have of anything after the accident, where were you? A. I was on that little island drawn out there in the center (indicating).

Q. The median island here (indicating)? A. Yes.

* * *

[157] Q. While you were there on that island, did you have any conversation with anyone? A. Yes.

Q. With whom did you speak? A. There was a bus driver that came over and asked if he could help—

MR. SEDGWICK: Objection to this.

BY MR. WYLAND:

Q. Don't tell us what anybody said. A. A bus driver, two of the young ladies in the car, or who had been in the car, and Mr. Cooper.

Q. How did you leave the scene of the accident? A. In an ambulance.

Q. Up until the time the ambulance came to take you away, had you ever moved off that median strip? A. No.

* * *

[158] Q. Have you ever had any discussion with Mr. and Mrs. Miller about how this accident occurred or why? A. No, never.

Q. Are you able to tell us, Miss Orem, at what speed your car was traveling when the impact occurred? A. 20 to 25.

Q. Is that the same speed at which you had entered the intersection? A. No. I was traveling that speed—I don't know how many feet back—but I had slowed down because there were no control lights, and had tapped my brakes, and then picked up speed, as I went on through the intersection.

* * *

CROSS-EXAMINATION

BY MR. SEDGWICK:

Q. Mrs. Orem, just a few questions, please: Had you expected the traffic lights to be working as you came along there? A. Well, I hadn't expected it, no.

Q. You knew from long experience that the intersection was a light-controlled intersection? A. Yes.

[159] Q. But you weren't expecting at this hour of the evening to have the lights on, functioning? A. Because the lights were off all over town—traffic lights on up and down Georgia Avenue, Seventh Street, different locations in the City.

Q. You testified a moment ago that as you approached the intersection, your speed was 20 to 25 miles an hour, and you were asked why you were not going faster, and your answer, as I wrote it down, was "because the limit there is 25 miles an hour." Is that your recollection? A. I say the limit in the District of Columbia is 25 on the main streets.

Q. Are you suggesting that there is some other maximum limit at this corner? A. No.

Q. So, you were going about the maximum speed permitted by law under all conditions? A. About 20 to 25.

Q. Now, a little later in your testimony, you said that prior to arriving at this particular intersection, your speed also was 20 to 25 miles an hour. Had that been your sustained speed for some blocks prior to the collision? A. Dependent upon the situation. It had varied for an hour and a half.

[160] Q. Well, you had done considerable driving that day, from what you told us. Do you recall whether, in the last City block, say, commencing at Sixth Street, was your speed there also about 20 to 25 miles per hour? A. That's right.

Q. And you maintained that speed up to the intersection of Seventh Street? A. Just before. Just before.

Q. Just before, do you claim that you snubbed your brakes, or something like that? A. I tapped my brakes.

Q. Where before the intersection of Seventh Street did you tap your brakes? A. 15 or 20 feet back.

Q. What was your reason for tapping your brakes? Had you seen— A. I was approaching an intersection and the lights were out, and in an unprotected intersection I always do that.

Q. But you saw no other car approaching the intersection from any other direction that prompted you to tap your brakes? A. That's right.

Q. Thereafter, after tapping your brakes, do we understand that your speed was 20 to 25 miles per hour? [161] A. I accelerated on going through the intersection and picked up again.

Q. Actually, then, you were increasing your speed from the time you entered the intersection until the time the cars came together? A. Yes.

Q. When you come from Sixth Street to Seventh Street, back at this particular time, on your right side, as you would get as close to the corner as you are sitting, from where you are sitting to the end of this courtroom, you could see diagonally to your right, couldn't you? A. I don't think quite that distance. There was a temporary building at that time there.

Q. But the temporary building sat back some distance from the sidewalk line, didn't it? A. It did.

Q. And there are large trees about this big around (indicating) that were standing, isn't that true? A. Yes.

Q. And so, those trees are some distance back from the sidewalk, aren't they? A. Yes.

Q. And the building would be still back of the trees? A. Yes.

Q. —From where you were approaching the intersection of [162] Seventh Street, and you were about that far to the end of the room, and that's supposed to be the intersection for the purpose of this question (indicating). You could see between those trees and the lawn area there, diagonally, north on Seventh Street for about half a block up Seventh Street, couldn't you? A. I don't know whether it would be quite half a block.

Q. Third of a block? A. Probably about a third.

Q. Now, in that distance that you could see north on Seventh Street a third of a block, when you looked to your right did you not see any cars coming? A. I did not see any cars.

Q. Then, your counsel asked you if you at that time also looked to your left, and you say you saw no cars there either? A. That's correct.

Q. And you saw no cars in front of you going west? A. That's right.

Q. And you saw no cars coming east on Independence Avenue, of any kind? A. That's right.

Q. As far as you were concerned, then, as you were that distance from the corner, you were the only car coming toward that intersection? A. Yes.

[163] Q. Now, when you accelerated through the intersection, do you think that you might have gotten up beyond the 25-mile limit? A. No, I don't think so.

Q. I asked you a while ago, when I called you as a witness to the stand, whether car tracks were there. I ask you to look at the police photograph, Exhibit Number 9—I ask you if you see the car tracks there which you said were not there. A. Well, these are car tracks before the intersection. They are not in the intersection.

Q. But the street car tracks are there, aren't they? A. Yes.

Q. When counsel asks you about lanes, let's get over to this side of the map—where you were coming in this direction, as you come a distance of from where you are to the end of the courtroom, is there anywhere between the streetcar track and your right curb, any white line marking any lane? A. I don't remember that.

Q. Do you not know by reason of your long years of traveling there that there is only one white line denoting a separation of lanes between your right curb and the streetcar tracks? Don't you know that to be so? [164] A. No, I don't know that.

Q. Don't you know that when you get to the corner here, for the first time there are lanes, there are two lines marking three lanes, one of which next to the curb would be for use of any motorist who might be there who wanted to go north on Seventh.

My question to you is: Is it not at a distance of 15 or 20 feet there are these white lines there? A. That may be the way it is now.

Q. Wasn't that the way it was then? A. Not as I remember it.

* * *

[165] REDIRECT EXAMINATION

BY MR. WYLAND:

Q. Miss Orem, I want to ask you about these street-car tracks. Are there any street-car tracks, or were there at this time in the intersection? A. No, no street-car tracks in the center.

Q. Any street-car tracks west of the intersection? A. No.

Q. Were there any street-car tracks east of the intersection? A. This picture shows it.

Q. Does the picture show those street-car tracks ending short of the intersection? A. Short of it?

Q. Yes. A. I can't tell by this, but I know from driving there is nothing in that center portion.

Q. Regardless of where the street-car tracks are, as you approached the intersection, were you traveling on the street-car tracks? A. Not that I remember.

Q. Let me ask you: Were the street-car tracks [166] immediately next to the center line of the street? A. Well, they would be, yes.

Q. You have indicated that you were in the middle of the three driving lanes. In which of those three lanes would the street-car tracks have been? A. Well, would be in the one near the center.

Q. Is that the lane you were in? A. No.

* * *

[168] THE COURT: Are you raising the issue of contributory negligence?

MR. WYLAND: Not with respect to Mrs. Miller.

THE COURT: With respect to Mr. Miller?

MR. WYLAND: With respect to Mr. Miller, yes.

MR. SEDGWICK: No problem.

THE COURT: Do you have any requested instructions?

* * *

[171] MR. WYLAND: Yes, your Honor. At the point we stopped yesterday, I had completed calling all my witnesses, and as I recall, all of my exhibits have been offered, and I have no further evidence. I rest.

* * *

[172] MR. SEDGWICK: That completes the plaintiffs' case.

* * *

MR. SEDGWICK: On the record at this time, I would like to make a motion in behalf of the plaintiff Hallie Miller for judgment in her favor as a matter of law, on the ground of [173] no negligence on her part and on the ground of admitted negligence on the part of the defendant Orem.

THE COURT: I will deny the motion.

* * *

[176] MR. SEDGWICK: The instructions that I had requested were 91, 92, 94, 180 and 182. I didn't have the list before me when you were telling me how you ruled on them.

THE COURT: I granted all of those.

Is there anything else we need to take up?

MR. SEDGWICK: I know of nothing else, as far as the plaintiffs are concerned.

* * *

[178] THE COURT'S CHARGE TO THE JURY

THE COURT: Lady and Gentlemen of the Jury: In the case which it is now my responsibility to submit to you for your deliberation and decision is that of Hallie Miller and Boyd C. Miller against Virginia Orem, which alleges that there was an automobile collision on May 8, 1966 about 8:15 p.m. at the intersection of Seventh Street and Independence Avenue, Southwest. It is alleged that the car in which the Plaintiffs Miller were riding was proceeding South on Seventh Street, and the car which Defendant, Miss Orem, was driving was proceeding west on Independence Avenue, and the

collision occurred at the intersection of Seventh Street and Independence Avenue.

[179] The Plaintiffs Miller allege that the accident was due solely to the negligence of Miss Orem. Miss Orem denies any negligence, but alleges that the accident was due solely to the negligence of the Miller driver, Samuel B. Cooper, Jr. And with respect to the claim of Boyd C. Miller, Miss Orem also alleges that there was contributory negligence which would foreclose Mr. Miller from recovering in any event, which I will discuss with you more in detail in a moment.

So that you will see that the issues in this case are relatively few, having in mind that the suit was brought by the Millers, the first question which you are called upon to decide is whether or not Miss Orem was negligent, and if that negligence was a proximate cause of the collision between the two automobiles.

If you find that the Plaintiffs have proved by a preponderance of the evidence, as I shall define it to you in a few moments, that Miss Orem was negligent, then the Plaintiffs will be entitled to a verdict at your hands, unless with respect to Mr. Miller you find that Mr. Cooper was also guilty of negligence which was a proximate cause of the injury. And in that event, and if you find that he was guilty of contributory negligence, that Mr. Miller would not be entitled to recover; but your verdict would be for the defendant in so far as Mr. Miller is concerned.

[180] So far as Mrs. Miller is concerned, she being only a passenger in the car, not being chargeable with the negligence of the man who was driving the car, her car, if you find that Miss Orem was negligent and that that negligence was the proximate cause of the collision and the resulting injuries to Mrs. Miller, your verdict should be in her favor, in any event.

I will discuss all of those elements with you in a moment, I hope clearly. I will do my best.

As you know—and I know you have served on juries before this month,—in cases of this kind, it is the responsibility of the judge presiding at the trial to pass on questions of law which arise during the course of the trial, most of which is done at the Bench in your presence but out of your hearing, and with which you are not concerned.

It is now my responsibility, as the trial judge, to give you the principles of law which should govern you in your deliberations as jurors in deciding the issues of fact which you are called upon to decide: First, Is there liability in this case? And by "liability," I mean, was there negligence and proximate cause? If there was liability, what damages were sustained by the plaintiffs or either of them.

In reaching that decision, you are the sole judges of the issues of fact. That is your function. You reach that [181] judgment upon considering all of the evidence which you have heard during the course of the trial. That means that the testimony of the witnesses who appeared before you and the exhibits which have been received in evidence and the inferences reasonably deducible from the testimony of the witnesses and the exhibits.

You should weigh that evidence objectively, dispassionately, without any feelings of sympathy for or prejudice against any of the parties to this proceeding. You are performing an important judicial function, and must not permit yourselves to be influenced in any other way.

In that regard, I say to you—and I am sure counsel will agree with me—that the opening statements of counsel and their arguments which you have just heard and which have just been concluded are not evidence. They have summarized their recollection of the evidence and their interpretation of the evidence to you. They have done it as advocates, fulfilling the performance of their duties properly and well. If their recollection of the evidence or their interpre-

tation of it is different from yours, it is your recollection, it is your interpretation which is controlling because you base your verdict on the facts as you remember them, as they were testified to you from the witness stand.

[182] I said to you a moment ago that one of the points and one of the first points you have to consider deals with the burden of proof. I want to read to you the well-stated proposition of law which we all accept, and which I think I can give you better by reading it than by trying to state it off-the-cuff: The party who asserts the affirmative of an issue has the burden of proving it. This burden he must generally carry by what is termed a preponderance of the evidence.

The term "preponderance of the evidence" does not mean such degree of proof as produces absolute or mathematical certainty, nor does it mean proof beyond a reasonable doubt, that is, proof to a moral certainty, as is required in criminal cases. "Preponderance of the evidence" means such evidence as when weighed against that opposed to it has the more convincing force. It is a question of quality and not of quantity, which is to say, it is not necessarily determined by the number of witnesses or documents bearing on a certain version of the facts.

To establish by a preponderance of the evidence is to prove that something is more likely so than no so. In other words, a preponderance of the evidence means such evidence as when considered and compared with that opposed to it has the more convincing force and produces in your minds' belief that what is sought to be proved is more [183] likely true than not true.

A party has succeeded in carrying the burden of proof by a preponderance of the evidence on an issue of fact if after consideration of all the evidence in the case, the evidence favoring his side of the issue is more convincing to you and causes you to believe that on that issue the probability of truth favors that party.

If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party against whom the burden of proof on that issue rests.

Having in mind what we mean by "burden of proof," if you should find that it was peculiarly within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with caution the weaker and less satisfactory evidence actually offered on that point, unless the failure to produce the stronger and more satisfactory evidence has been satisfactorily explained to you.

Also, it is a principle of law dealing with the burden of proof that no inference of negligence arises from the mere happening of the accident in this case. You are not to infer from the mere fact that the accident happened, that some party or any party to this accident was negligent.

[184] On the contrary, the legal presumption was, reasonable care was exercised by both parties. The burden of proof is upon the party charging negligence to overcome this presumption of due care by a preponderance of the evidence and to prove that the negligence if established, was the proximate cause of the accident.

Also—still dealing with the burden of proof—having in mind my statement to you that you are the sole judges of the issues of fact in the case, I call your attention to the fact that you are also the sole judges of the credibility of the witnesses who appeared before you and who have testified before you, because you must weigh and determine the weight to give to the testimony of each witness whom you heard. You alone are to determine whether to believe any witness and the extent to which any witness should be believed. If there is any conflict in the testimony, it is your function to resolve the conflict and to determine where the truth lies.

In reaching a conclusion as to credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. You may consider the

demeanor and the behavior of the witness on the witness stand, the witness's manner of testifying, whether the witness impressed you as a [185] truthful individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which he or she has testified, whether the witness has any interest in the outcome of this case or friendship or animosity towards other persons concerned in this case.

You may consider the reasonableness or unreasonableness, probability or improbability of the testimony of the witness in determining whether to accept it as true and accurate. You may consider whether he or she has been contradicted or corroborated by other credible evidence. If you believe any witness has shown himself to be biased or prejudiced, either for or against either side in this trial, you may consider and determine whether such bias and prejudice has colored the testimony of such witness so as to effect the desire and capability of that witness to tell the truth. You should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

Also dealing with the burden of proof and the matter of credibility, the testimony of a witness may be discredited or impeached by showing he has previously made statements which are inconsistent with his present testimony. [186] The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. You may consider the prior statement only in connection with your evaluation of the credence to be given to the witness's present testimony in Court. You must not consider the prior statement as establishing the truth of any fact contained in the statement. If you believe that any witness has been thus impeached and discredited, it is your exclusive province to give his testimony such weight, if any, as in your judgment it is fairly entitled to receive.

I also say to you in dealing with the question of credibility that in judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption is not conclusive, however, and it may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony or by evidence pertaining to his motives. Where there is a conflict in his testimony with respect to a material fact, you must judge the credibility of the witnesses and you must determine which of the versions should be accepted as true.

In this case, you have had the benefit of the testimony of expert witnesses and we have several principles [187] of law dealing with the weight to give to the testimony of such experts.

A person who by education, study and experience has become an expert in any art, science or profession and who is called as a witness may give his opinion as to any such matter in which he is especially versed and which is material to the case. It should be considered and weighed by you like any other evidence in the case. You are not bound by it if the facts upon which the opinion is based have not been established to your satisfaction by the evidence. However, you should not reject it if it is uncontradicted and not inherently unreasonable.

In this case there has been some conflict in the testimony of expert witnesses. By considering and weighing the credibility and qualifications of the respective experts who have testified, the logic of the reasons given in support of their opinions, the other evidence in the case which favors or opposes a given opinion, and by using your own experience and good judgment as reasonable and intelligent people, you must resolve that conflict and determine which of the opinions to accept as accurate.

I think I have covered rather fully—and I hope clearly—the issues and the principles which should guide you in the performance of your duty as jurors in determining the issues of fact in this case.

[188] As I said to you a moment ago, the questions in this case—Was there negligence? Was that negligence a proximate cause of the collision which occurred and the subsequent injuries sustained by the plaintiffs? Also, was there contributory negligence on the part of the driver of the Miller automobile, which would have a bearing upon the claim of Mr. Miller, if there was such contributory negligence.

I want to get to now what we mean by negligence. I am going to read it in a few moments, and in relation to that matter, traffic regulations which have been received in evidence. I will discuss those with you briefly.

Negligence is the failure to exercise ordinary care. It is the doing of some act which a person of reasonable prudence would not do or the failure to do that which a person of reasonable prudence would do if he were actuated by those considerations which ordinarily influence every-day conduct.

Negligence is not an absolute term, but a relative one. This means that in deciding whether there was any negligence in this case, the conduct of a party must be considered in the light of all the surrounding circumstances which have been shown to you by the evidence. The reason [189] for this rule is that we know that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense, are a part of the conduct in question. An act that is negligent under one set of circumstances might not be so under another. Therefore, to arrive at a fair standard we ask what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances. Our answer to that question gives us the criteria by which to determine whether or not the evidence before us proves negligence or contributory negligence, as I shall define it to you.

You will further note that in the exercise of ordinary care, the reasonably prudent person will vary his conduct in direct proportion to the danger which he knows, or should know, to be involved in

his undertaking. The amount of caution required by the law increases with the danger that reasonably should be apprehended.

I said to you that it has been contended that Mr. Cooper who was driving the Miller car was also negligent, in other words, contributorily negligent. Contributory negligence is negligence on the part of the person injured—in this case on the part of the driver of the automobile—which, combining to some degree with the negligence of another, [190] helped in proximately causing an injury of what Mr. Miller complains.

If you find that the driver of the Miller car was guilty of such negligence, you should find for the defendant in so far as the claim of Mr. Miller is concerned, because if the driver of the car was guilty of contributory negligence, Mr. Miller may not recover from another for the injuries sustained in this case.

I told you a moment ago that there had been received in evidence certain traffic regulations. These regulations were in full force and effect in the District of Columbia at the time of the collision in question. I am going to read them to you. There are not too many, and they are relatively short.

The first one is 21-A (Section 21-A) which reads:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumstance, and in a speed or manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

Section 22-A reads:

"No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent [191] "under the conditions, and having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the street or highway, in compliance with legal requirements and the duty of all persons to use due care."

Section 22-B:

"Except when a special hazard exists that requires lower speed for compliance with sub-section A of this Section"—and that's the one I just read to you—"the limit specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a street or highway at a speed in excess of such maximum limits as sub-paragraph one reads: 25 miles per hour unless otherwise designated by official signs."

Section 46-A reads:

"The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway."

Section 46-B reads:

"When two vehicles enter an intersection of different highways at approximately the same time, the [192] "driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."

And the remaining traffic regulation which was offered and received in evidence is Section 99-C, which reads:

"An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

You are instructed that violation of any of these regulations constitutes negligence in the sense that it is conclusive evidence of failure to exercise due care on the part of the party charged with the duty to obey the regulations.

By admitting these regulations in evidence and reading them to you, I do not mean to suggest that there is any evidence of violation of any of these regulations. That is an issue of fact which you are called upon to decide: Was there a violation of any of these regulations, and if so, by whom?

Therefore, the first question for you to determine with respect to the alleged violation of traffic regulations is whether or not these, or any of them, were violated. If you find that they were not

violated, then you need give this subject no further consideration. If you find that [193] they were, either all or some were violated, then you must proceed to determine whether or not such violation was a proximate cause of the collision. Negligence alone does not equal liability. A simple breach of duty having no causal connection with the injury cannot produce legal responsibility. Both negligence and causation must be proved by a preponderance of the evidence.

To summarize, violation of a traffic regulation such as are involved in this proceeding is, in and of itself, negligence in the sense that it is conclusive evidence of failure to exercise due care on the part of the person violating the regulation. But this negligence does not produce legal liability unless you further find that such negligence was the proximate cause of the injury sustained by the plaintiffs in this case, by Mrs. Miller; and further find that the plaintiff, driver Cooper, was not guilty of contributory negligence under the instructions which I have given you.

Having read the regulations to you, I wnat to go a little bit further on the law with respect to the duty of a motorist under those regulations and under general principles of law. Every person driving on a public highway [194] must exercise ordinary care at all times to avoid colliding with other persons who are also using the highway, and to avoid placing himself or others in danger; and while he may assume that others will exercise due care and obey the law, he may not, for that reason, fail to exercise ordinary care.

When a person is using or about to use a street or highway, either as a pedestrian or as the operator of a motor vehicle, he has a duty to keep a proper lookout and make reasonable observations as to traffic and other conditions which confront him, in order to protect himself and others while using the roadways. What observations he should make and what he should do for his own safety are matters which the law does not attempt to regulate in detail, except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

The fact that one who has a duty to look testifies that he did look, but did not see that which was plainly there to be seen is of no legal significance, for the requirement imposed by law is to look effectually; and one who looks and does not see that which is plainly there to be seen is as negligent as one who does not look at all.

Also dealing with the right-of-way which I read to you, the regulation, you are instructed with respect to the issue [195] of right-of-way or the negligence of the party in failing to yield the right-of-way, that such a right-of-way is relative and not absolute, and that you must take into consideration not only who had the technical right-of-way but the relative distance of the vehicles from the intersection, their respective speeds and other prevailing traffic conditions.

You are further instructed that the party having the right-of-way has the right to assume that the other party will comply with the law and yield to him. But the fact that he has the technical right-of-way does not excuse him from exercising ordinary care to avoid injury to others.

I have got here a note on contributory negligence. I think I have given that to you. The defendant claims that Mr. Cooper was guilty of contributory negligence, and as to that issue the burden is upon the defendant to prove that Mr. Cooper was guilty of contributory negligence.

I think I have covered the matter of negligence rather fully for you to determine if there was any negligence in this case, and if so, by whom.

There is one other legal matter which I want to discuss with you, and that is this matter of proximate cause. I have used that expression several times, and I shall use it [196] a little later in dealing with the matter of damages. I said, "The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that that negligence was the proximate cause

of the collision which occurred and the resulting injuries which the plaintiff sustained." In law, that means, the proximate cause of injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors which accomplish the injury, whether operating directly or by putting intervening agencies in motion.

Under these instructions, the first question which you are called upon to decide is whether or not the plaintiff has established that the defendant was negligent, and that that negligence was a proximate cause of the collision and the resulting injuries.

If you find that the plaintiff has established that negligence by a preponderance of the evidence, you will then proceed to the matter of damages in so far as Mrs. Miller is concerned. If you find that the plaintiffs have established that the defendant was negligent, and that that negligence was the proximate cause of the collision which [197] caused Mr. Miller's injuries, you will then proceed to determine whether or not the driver of the car was guilty of contributory negligence. And on that issue, the burden of proof is on the defendant to prove by a preponderance of the evidence that Mr. Cooper was guilty of contributory negligence. .

I want to elaborate on that very briefly by pointing out to you that Mr. Cooper was driving the car and Mr. Miller was the owner of the car. The law is that if the driver of the car under those circumstances, was guilty of contributory negligence, the owner of the car cannot recover because the negligence of the driver is imputed to him. That is not so with respect to Mrs. Miller who was a passenger. I hope I make that clear to you.

If you reach the matter of damages, having determined that there was liability and also that there was negligence, in assessing the damages to which the plaintiffs are entitled, you may take into

consideration any of the following items which you believe from the evidence could have resulted from the negligence of the defendant: One, any bodily injuries sustained and the extent and duration thereof; two, any effect of any such injuries upon the health of the individual, according to its degree and probable duration; three, any physical pain and [198] mental anguish suffered by the party in the past and which may reasonably be expected to be suffered by the party in the future; four, any inconvenience and discomfort caused in the past and any which will probably be caused in the future, also any doctors', hospitals' and medical expenses incurred in the past, any loss of earnings in the past, and by reason of being unable to work at their respective callings.

In this regard, I instruct you that if you find for the plaintiffs such sums as will reasonably compensate them for loss of income attributable to this accident, you must do so, notwithstanding the fact that plaintiffs received wages and other benefits during periods of absence due to the accident. Also, you will include any damages to Mr. Miller representing the damage to the automobile, as to which you have evidence, and if you find that the damage to the automobile was a result of the defendant's negligence; and from these as proved evidence, your verdict should be for such sum as will fully and fairly compensate each plaintiff for the damages sustained by them.

In this regard, as I have said to you before: As the burden of proof is upon the plaintiffs to prove negligence and proximate cause, the burden is also upon the plaintiffs to establish all the elements of their damage. The amount of [199] your verdict should be based upon the evidence presented by the plaintiffs as to the injuries and losses. You are not to award to the plaintiffs speculative damages, that is compensation for permanent or future detriment, which although possible, is remote, conjectural or speculative. You are to base your verdict as to future losses not upon conjecture or specula-

tion, but only upon evidence which shows by a preponderance that there is reasonable probability that there will be future damage resulting from the original injury.

It is not necessary the plaintiff shows there is an absolute certainty that the loss will continue into the future; it is sufficient that the plaintiffs show that there is a probability that the injury and loss will continue, in which event allowance should be made for it.

Do counsel have any matters they want to take up with the Court?

* * *

COURT: Did you have anything?

MR. SEDGWICK: In behalf of Mr. Miller, I think the time has come to make a test, that is, on whether imputed negligence of the driver under the circumstances of the evidence in this case should be and can legally be against [200] the owner of the car who is exercising neither control nor his right of control over the vehicle.

THE COURT: You take exception to that part of the charge?

MR. SEDGWICK: Yes.

MR. WYLAND: Are you finished, Mr. Sedgwick?

MR. SEDGWICK: Yes, indeed.

* * *

THE COURT: Members of the jury, that concludes the charge which I have to give to you. It is your responsibility to decide this case under the charge which I have given you, which I hope has not been too involved and difficult.

You will retire to the Jury Room. You will select [201] one of your number to serve as your foreman or forelady, as the case may be, and proceed with your deliberations.

In this case, you will return two verdicts. In other words, you treat the two plaintiffs as two separate cases. In other words, the Clerk will ask you, "Have you agreed upon a verdict with respect to

Mrs. Miller?" and the verdict will be either for the plaintiff or for the defendant. If it is for the plaintiff, it will then be stated in such amount as you determine under the evidence she is entitled to receive.

You will return a separate verdict with respect to Mr. Miller. The clerk will ask you "with respect to Mr. Miller, have you agreed upon a verdict—is it for the plaintiff or the defendant?" If you find for the plaintiff in the case of Mr. Miller, it is then to be in such an amount as you determine he is entitled to receive under the instructions which I have given to you.

In both instances, your verdict must be unanimous. In the course of your deliberations if you should require any of the exhibits which have been received in evidence, you may send word to me and I will see if I can send them to you.

There will be a marshall stationed outside of the jury room, and when you have any message to send to me, you may do it through him. When you have agreed upon a verdict, [202] you will let him know that you have done so, and he will call me and I will hear you in Court for the purpose of receiving the verdict of the jury.

* * *

THE COURT: I have a note from the jury which reads:

"Jury would appreciate having following:

1. Pictures of cars, taken by police officers." There is no problem. 2. "Handwritten statement of Claims Adjuster prepared, North Carolina."

I think we agreed that part of that had to be deleted.

* * *

[203] 3:05 p.m.

(Jury came forth from Jury Room again and stood in front of Jury Box.)

THE CLERK: Will the foreman please step forward? Has the jury agreed upon a verdict?

THE FOREMAN: They have.

THE CLERK: In the case of Hallie Miller v. [204] Virginia Orem, do you find for the plaintiff or for the defendant?

THE FOREMAN: For the defendant.

THE CLERK: Members of the Jury, your foreman says that on the complaint of Hallie Miller against Virginia Orem, Civil Action 1322-67, you find for the defendant Virginia Orem. Is that your verdict, so say you each and all?

(All jurors reply "yes.")

* * *

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,532

---

HALLIE MILLER,

*Appellant,*

v.

VIRGINIA OREM,

*Appellee.*

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE DISTRICT OF COLUMBIA*

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## BRIEF FOR APPELLEE

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United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 11 1970

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## BRIEF FOR APPELLEE

### STATEMENT OF ISSUES

In the opinion of the defendant the sole issue presented by this appeal is whether the evidence presented at trial was sufficient to warrant the trial court in ruling that the defendant was guilty of negligence as a matter of law. The other issues specified by the plaintiff on brief are subsidiary to and dependent upon this single controlling issue.

## COUNTERSTATEMENT OF THE CASE

The parties are described herein as they appeared in the Court below.

The plaintiff brought suit against the defendant to recover damages for personal injuries sustained in an automobile collision. The case was tried before the lower court, with a jury, and resulted in a verdict in favor of the defendant. A Motion for New Trial or in the alternative for a Judgment N.O.V. was filed and overruled. This appeal followed.

This action resulted from an automobile collision which occurred at approximately 8:15 p.m. on May 8, 1966, at the intersection of Seventh Street and Independence Avenue, S.W., Washington, D.C. At that intersection Seventh Street is 76 feet wide and Independence Avenue is 80 feet wide (App. 30), the latter street being divided by a narrow concrete median strip beginning at the west side of the intersection (P's Ex. 9). The intersection is ordinarily controlled by electrically operated traffic control signals which were not in operation at the time of the accident (App. 29). The street lights were on (P's Ex. 9). The street surface was wet, and rain was falling at the time of the collision (App. 3).

The police investigation at the scene of the accident revealed the impact between the vehicles to have occurred 23 feet south of the north curb of Independence Avenue and 66 feet west of the east curb of Seventh Street (App. 30). The plaintiff's vehicle travelled 19 feet into the intersection after impact (App. 27) and left 19 feet of measurable skid marks upon the street surface before impact (App. 31). It came to a stop facing in a northwesterly direction, having turned in a clockwise fashion (P's Ex. 9).

The defendant's vehicle was struck on its right side beginning at a point to the rear of the right front wheel by the full front of the plaintiff's automobile (P's Ex. 6, 11, 13-15). The defendant's vehicle, from the point of impact, traveled in a southwesterly direction across the median strip, turned in a clockwise direction and rolled to a stop against a small tree on the south curb of Independence Avenue (P's Ex. 13-15). The defendant lost consciousness at impact, and fell from her car as it crossed the median strip (App. 48). The total distance traveled by the defendant's automobile was 115 feet from the point of impact (App. 27). The point at which the defendant fell from her vehicle was 47 feet from the impact point (App. 31).

The plaintiff testified that she was seated in the center of the front seat of the vehicle (App. 2) which was being operated by an employee of the family corporation (App. 32). She was looking straight ahead and had no indication that there was going to be a collision until she heard her husband shout a warning (App. 3). She did not see the defendant's car before the collision (App. 4).

The defendant testified that she approached the intersection in the center of three westbound lanes at a speed of from 20 to 25 miles per hour (App. 47). She looked to her right as she approached the intersection but before she actually entered it (App. 47), and at that time she could see about one-third of the distance of the block north of Independence Avenue (App. 51). She saw no approaching traffic (App. 51). She had braked her vehicle slightly upon reaching the intersection, and upon seeing no other moving traffic she accelerated to regain her 20 to 25 mile per hour speed ( App. 50). She first saw the hood of the plaintiff's car a "split-second" before impact (App. 37), and at that time she was in or approaching the next-to-last lane on Seventh Street (App. 36).

## REGULATION INVOLVED

D. C. Traffic Regulations, Section 46 (a)–

> The driver of an automobile approaching an intersection shall shall yield the right of way to a vehicle which has entered the intersection from a different highway.

## ARGUMENT

The argument of the plaintiff has as its thesis the proposition that the verdict in the defendant's favor cannot stand because she was negligent as a matter of law. In support of this thesis the plaintiff relies upon selected excerpts from the testimony, some of which references are incomplete or distorted, and to familiar authorities which hold, in general, that one who fails to see what is there to be seen is negligent. An analysis of the authorities cited by the plaintiff will not support her thesis, when tested by the evidence available for the consideration of the jury.

There was evidence from which the jury could have found that the defendant's vehicle entered the intersection *well* before the plaintiff's vehicle, the front of it having traversed all but three to five feet of a street 76 feet wide before being struck on the right side by the full front of the plaintiff's vehicle which had crossed about one traffic lane.

Secondly, the jury could have found that the defendant, as she was about to enter the intersection and when she looked to her right, was able to see one-third of a block and that the plaintiff's vehicle was not then in sight.

Thirdly, the jury could have found that the force of the impact, the movement of the vehicles after impact and their final resting positions evidenced a much higher rate of speed on the part of the plaintiff's chauffeur than her evidence revealed. Further, this could

have explained to the satisfaction of the jury why the plaintiff's vehicle was not visible to the defendant in the one-third block which she could see at the time she entered the intersection.

The question for this court to determine is whether the failure of the defendant, after having lawfully entered the intersection, to see the plaintiff's vehicle until a "split-second" before impact is a sufficient basis for upsetting the verdict. Stated another way, the question is whether the evidence of negligence on the part of the defendant is so clear that this court is justified in substituting its judgment for that of the jury.

At the outset it is important to note the rule which is applicable, and which appears in the authorities cited by the plaintiff:

> ". . . where the facts clearly appear from the undisputed evidence, where they are such that, conceding every legitimate inference, but one reasonable conclusion may be drawn, the issue is one of law for the court." *Brown v. Clancy,* 43 A.2d 296, 297.

It is the position of the defendant that the evidence is not so clear that not more than one inference or conclusion may be drawn from it. For example, there can be no question but what the jury could have found (1) that the defendant entered the intersection lawfully with the status of the "favored" operator, as contemplated by Section 46 A of the Traffic Regulations, and (2) that any negligence on her part was not a proximate cause of the collision. A review of the princpal cases cited by the plaintiff reinforces these conclusions.

In *Brown v. Clancy, supra,* the plaintiff's evidence showed that on a clear day he entered a controlled intersection as the unfavored driver when the defendant was 50 feet away. Although the plaintiff had a clear view of the street for a distance of 250 feet he did

not see the defendant until he was 20 to 30 feet away. In the instant case there is no evidence that at the time the defendant entered the intersection, as the favored driver, that the plaintiff's vehicle was in sight or was then an immediate hazard.

In *Brown v. Saunders,* 89 A.2d 632, the plaintiff, when in the middle of the intersection (having left a Stop sign) could see from 100 to 150 feet, but was struck by the defendant after having moved but nine feet. The holding in that case is hardly applicable here. Again, the defendant in the instant case was the *favored* driver and the jury could have found that her obligation to keep a lookout in *all* directions prevented her from seeing the plaintiff until a "split-second" before impact.

*Pryor v. Scott,* 146 A.2d 569, cited by the plaintiffs, hardly deserves comment. Any litigant who proceeds into the path of an oncoming vehicle which he sees at a distance of 20 to 40 feet away cannot complain if he is found guilty of contributory negligence. However, those facts and that holding have no applicability here.

In *Phillips v. D.C. Transit System,* 198 A.2d 740, the plaintiff, again the unfavored driver, left a Stop sign on a clear, dry day and cannot complain, if he is found guilty of contributory negligence. "split-second" before impact. The controlling distinction between that case and this one is that the defendant was visible to the plaintiff when the latter entered the intersection. There was no such evidence here and, as indicated above, the jury could have found that the plaintiff's vehicle was not within the defendant's visibility when she entered the intersection.

The cases of *Simms v. Eastern Railway Company,* 222 A.2d 641, and *Singer v. Doyle,* 236 A.2d 436 are not markedly different from those cited above, and neither is applicable to the instant case. In each of those cases the plaintiff, as the unfavored driver, was

struck by a vehicle approaching at a distance well within his unobstructed view. There can be no quarrel with the holdings in those cases, but they simply are not in harmony with this case, either in fact or in principle.

This case, like any other action in which facts and the inferences to be drawn from them are disputed, turns upon the credibility of the witnesses and the weight which the jury sees fit to assign to the various pieces of evidence offered for its consideration. The plaintiff's chief liability witness was her husband who testified that his chauffeur was in the second lane from the curb on Seventh Street, approaching Independence Avenue at a slow speed. He further testified that as his vehicle entered the intersection he saw three cars coming from his left (the direction from which the defendant approached) and that the defendant's vehicle was traveling at a speed of from 40 to 50 miles per hour. He testified that he saw the defendant's car when it was several car lengths from the intersection and that his vehicle was in the intersection well before the defendant's vehicle entered. (App. 10-12).

The defendant's evidence established that shortly after the accident the plaintiff's husband was interviewed by a representative of the defendant's liability insurance carrier, and that interview produced a hand-written narrative statement which was signed by the plaintiff's husband after he had carefully examined it. The contents of that statement were directly contrary to his testimony at trial (App. 38-45).

The plaintiff herself, while not testifying directly as to liability, assisted her husband in discrediting her case by claiming that a hospitalization on March 20, 1967, and the resultant loss of income, was attributable to the accident (App. 5-7), when in fact the hospital record which was later admitted into evidence clearly revealed

no connection between the condition for which she was treated and any injuries she might have sustained in the accident (D's Ex. 3).

The defendant was called as a witness by the plaintiff as part of her case-in-chief, and was later re-called during her own case-in-chief. Her testimony was not impeached in any fashion and no part of it was ever demonstrated to be erroneous or inherently incredible. Moreover, during her rebuttal the plaintiff did not offer any evidence or make any attempt to rehabilitate her own credibility or that of her husband, who was her own liability witness.

## CONCLUSION

The defendant respectfully submits, that conceding every legitimate inference to her which can properly be drawn from the evidence, and to which she is entitled by reason of the verdict, the state of the evidence is not such to justify any court in holding that her conduct amounted to negligence as a matter of law and that, as a matter of law, that negligence was a proximate cause of the collision. Therefore, the defendant respectfully submits that the judgment in the trial court should be affirmed.

Respectfully submitted,

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